United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

74-1955

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P/S

IN THE

United States Court of Appeals

For the Second Circuit

No. 74-1955

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

against

ROBERT WILNER,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S APPENDIX

LA ROSSA, SHARGEL & FISCHETTI
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UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

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DOCKET ENTRIES

THE UNITED STATES

vs.

JAMES ADAMS, RICHARD BELANGER, NICHOLAS CALABRO, DOMINIC MECCA, RICHARD PALMER, STEVEN SMITH, GARY STEPHAN, PAUL STEPHAN, ROBERT VISSA, ROBERT WILNER and JOHN DOE, a/k/a "Anthony".

73 CRIM. 1102

PROCEEDINGS

12- 7-73	Filed indictment.
12-17-73	Adams(Mecca(Calabro(No appearance by attorneys. Belager((sic) Court directs entry of not John Doe(guilty pleas. Vissa(Smith(
	Mecca - continued on bail fixed by Mag. ($10,000. secured by $500.) Palmer - (atty. present) Pleads not guilty. Cont'd on bail fixed by Mag. (10,000 P.R.B. secured by 10%)
12-17-73	Wilner (atty. present) Pleads not guilty. Bail continued ($5,000 P.R.B.)
	Gary and Paul Stephan (Court directs entry of not guilty Plea. Bail continued as set by Mag. Paul Stephan $10,000. P.R.B. secured by $500. and Gary Stephan $10,000. P.R.B. secured by 10%.

	Motions returnable in 30 days. Case assigned to Judge Lasker for all purposes. Frankel, J.
1- 7-74	RICHARD PALMER - Filed notice of appearance by Warren B. Silbericlett, 200 Mamaroneck Ave., White Plains, N.Y. 10601. 914-RO 1-1771.
1- 9-74	VISSA - PLEADS NOT GUILTY - P.R.B. of $2,500. BELANGER - Pleads not guilty - P.R.B. $2,500. CALABRO - Pleads not guilty. WILNER - Pleads not guilty. LASKER, J.
1-11-74	SMITH - Deft. pleads not guilty - P.R.B. $2,500, LASKER, J.
1-15-74	ROBERT VISSA - Filed deft. motion to inspect Grand Jury Minutes Dismissing indictment. Granting B/P, etc. (with statement) (No Affdvt.)
2- 1-74	PAUL STEPHAN - Filed notice of motion and affdvt. for discovery.
2- 1-74	PAUL STEPHAN - Filed memo of law.
2-19-74	DOMINIC MECCA - Filed notice of motion for b/p, & affdvt. in support.
1-21-74	STEPHAN SMITH. Filed CJA Form #20, appointment of counsel Stuart R. Shaw, 233 B'Way., N.Y.C. 10007 233-8991. LASKER, J.
2- 1-74	Filed the following papers received from U.S. Magistrate: Docket Sheet, Indictment Warrent, Disposition Sheet, Notice of Appearance and Appearance bond G.S. $10,000, D.M. $10,000., R.P. $10,000., R.W. $5,000., P.S. $10,000, N.C. $10,000., R.B. $2,500.
3-15-74	RICHARD PALMER - Filed order extending bail

limits to Carribean & South America from March 31-74 and to including 4-20-74. LASKER, J.

3-20-74 Filed Govt's memo of law in opposition to various motions.

4- 3-74 STEPHAN SMITH - Filed notice of motion for B/P. Ret. 4-15-74. With Affdvt.

4-24-74 STEPHAN SMITH - Filed affdvt. and notice of motion for dismissal of indictment, etc. ret. 5-3-74. Affdvt. in support.

4-26-74 ROBERT WILNER - Filed deft. affdvit. and notice of motion pursuant to R.14; Re.Trial.

4-26-74 ROBERT WILNER - Filed deft. memo of law.

5- 3-74 STEPHAN SMITH - Filed defts. memo of law in support of motion to dismiss indictment.

5-10-74 JAMES ADAMS - Filed CJA Form #21 Authorization and voucher for transcrip.(sic) LASKER, J.

6-20-74 RICHARD PALMER - Filed Judgment & Order of Probation (#74,558) - It is adjudged that the imposition of sentence of imprisonment is suspended and the Deft. is placed on Probation for a period of THREE (3) YEARS subject to the standing probation order of the court and the Deft. is FINED the sum of $2,500.00 to be paid within ninety (90) days hereof or the Deft. is to stand committed. Count two (2) is dismissed on the motion of the deft. --- LASKER, J.

5- 6-74 RICHARD PALMER - (AUSA Pykett) Deft., (atty. present) pleads GUILTY to Count 1. Presentence report ordered. Sentence date 6-14-74. Deft. R.O.R.

DOMINIC MECCA - Severed.

5- 6-74	Jury Trial begun for Deft's - BELANGER, CALABRO, SMITH, G. STEPHAN, P. STEPHAN, VISSA & WILNER. LASKER, J.
5- 8-74	Trial cont'd.
5- 9-74	Trial cont'd.
5-10-74	Trial cont'd.
5-13-74	Trial cont'd.
5-14-74	Trial cont'd.
5-15-74	Trial cont'd.
5-16-74	Trial cont'd.
5-17-74	Trial cont'd.
5-20-74	Trial cont'd.
5-21-74	Trial cont'd.
5-22-74	Trial cont'd.
5-23-74	Trial cont'd. Deft's CALABRO & SMITH, count 2 of Indictment dismissed, order of LASKER, J.
5-24-74	Trial cont'd. - Jury started deliberation at 4 PM and reached a verdict.
	R. BELANGER - found GUILTY on Ct.1 & 2. Pre-sentence report ordered. Date for sentence is July 12, 1974 at 10 AM.
	R. VISSA - found GUILTY on Cts. 1 & 2. Pre-sentence report ordered. Date for sentence is July 12, 1974 at 10 AM.
	R. WILNER - found GUILTY on Cts. 1 & 2. Pre-sentence report ordered. Date for sentence is July 12, 1974 at 10 AM.

N. CALABRO - found NOT GUILTY on COUNT 1.

S. SMITH - found NOT GUILTY on COUNT 1.

G. STEPHAN - found NOT GUILTY on COUNTS 1 & 2.

P. STEPHAN - found NOT GUILTY on COUNTS 1 & 2.
LASKER, J.

6-10-74 Filed transcript of record of proceedings dated May 7, 8, 9, 10, 13, 14, 1974.

6-10-74 Filed transcript of record of proceedings dated May 22, 23, 24, 1974.

7-12-74 RICHARD BELANGER - Filed Judgment & Commitment - It is adjudged that the Deft. is hereby committed to the custody of the Atty. General for imprisonment for a period of ONE (1) YEAR, on each of Counts 1 & 2, said sentence to run concurrently and not consecutively. At the expiration of such custody, the Deft. shall serve a SPECIAL PAROLE term of TWO (2) YEARS subject to the provisions of Title 21, Sec. 841(a)(1)(B). LASKER, J.

7-12-74 ROBERT VISSA - Filed Judgment & Commitment - It is adjudged that the Deft. is hereby committed to the custody of the Atty. General for imprisonment for a period of ONE(1) YEAR and on the condition that the Deft. be confined in a jail or treatment type institution for a period of SIX (6) MONTHS, the execution of the remainder of the sentence of imprisonment is suspended and the Deft. is placed on probation for a period of SIX (6) MONTHS subject to the standing probation order of this court,and thereafter to a TWO (2) YEAR SPECIAL PAROLE period subject to the provisions of Title 21, Sec. 841(b)(1)(B). Said sentences are to be served concurrently and not consecutively.---LASKER, J.

7-12-74	RICHARD BELANGER - Filed Notice of Appeal to U.S.C.A., 2nd Circuit from a final Judgment of conviction dtd. 7-12-74. Deft. granted permission to file appeal in formi pauperis. LASKER, J. (Copies mailed)
7-15-74	ROBERT VISSA - Filed deft's notice of appeal from the judgment dated 7-12-74. Mailed Notice to Deft., c/o Vincent W. Lenna, 50 Riverdale Avenue, Yonkers, N.Y. and to to US Atty.
7-19-74	Filed govt's memo of law.
7-19-74	Filed Govt's affidavit in opposition to deft's (sic) Wilner's motion for severance pursuant to Fed. R. Crim. P.14.
7-23-74	Filed transcript of record of proceedings, dated May 6, 1974.
7-23-74	ROBERT VISSA - Filed Notice - The Record on Appeal has this day been certified and transmitted to the U.S.C.A. for the 2nd Circuit.
7-29-74	RICHARD BELANGER - Filed Notice that the Supplemental record on appeal has been certified and transmitted to the U.S.C.A. for the 2nd Circuit.
8-19-74	Filed transcript of record of proceedings, dated June 21, 1974.
6-21-74	RICHARD BELANGER - Mailed original CJA copy 1 to the A.O, Wash., D.C. for payment. LASKER, J.
8-13-74	RICHARD BELANGER - Filed CJA for service of Court Reporter on 1/9, 4/25, 5/2, 5/7. LASKER, J.
8- 1-74	AUSA Pykett, Deft. WILNER (Atty. James La Rosa (sic) present).
8-26-74	Stephan Smith - Mailed original CJA copy 1 to the A.O., Wash., D.C. for payment. LASKER, J.

8-26-74	Gary Stephan - Mailed original CJA copy 1 to the A.O., Wash., D.C. for payment. LASKER, J.
9- 4-74	DOMINIC MECCA - Filed Deft's motion to suppress for a Pretrial Hearing.
9- 5-74	DOMINIC MECCA - Filed affdvt. of Daniel J. Pykett, Special Asst. U.S. Atty., in opposition to the motion of Deft. to suppress.
9-10-74	Richard Belanger - Notice to Docket Clerk the record has been certified and transmitted to USCA on 9-10-74.
9-10-74	Dominic Mecca - Memo-end on back of motion filed 9-4-74...Motion denied. It is So Ordered... Lasker, J.
9-16-74	DOMINIC MECCA - Jury trial begun - Lasker, J.
9-18-74	Trial cont'd. Deft's motion for enlargment of Bail + enconpass (sic) the Dist. of (illegible).
9-19-74	Trial cont'd.
9-20-74	Trial cont'd.
9-21-74	Trial cont'd.
9-23-74	Trial cont'd and concluded. Jury returned at 3:20 PM with a verdict of GUILTY on Counts 1 and 2. P.S.I. Ordered. Sentence adj'd. to 11/22/74 at 10:00 AM, Rm #1. Bail continued. LASKER, J.
10-17-74	RICHARD PALMER. Filed original Judgment and Order of Probation - Fine marked satisfied and entered in the money judgment book.
10-31-74	JAMES ADAMS - JOHN DOE - Closed statistically because defendant(s) is a fugitive. In all other respects this case is still pending.

11-22-74	DOMINIC MECCA - Filed Judgment & Commitment - It is Adjudged that the Deft. be committed to the custody of the Atty. General for a period of One (1) year on each of Counts 1 and 2, said sentence to run concurrently and not consecutive. At the expiration of such custody, the Deft. shall serve a Special Parole term of Two (2) Years subject to the provisions of Title 21, Section 841(b)(1)(B)---LASKER, J.
11-25-74	DOMINIC MECCA - Filed Notice of Appeal to U.S. C.A. for the Second Circuit from the sentence imposed 11-22-74. Deft. granted leave to appeal in forma pauperis -- LASKER, J.
11-26-74	ADAMS - Filed transcript of record of proceedings dated 1-11-74.
11-26-74	ADAMS - Filed transcript of record of proceedings dated 5-7-74.
11-25-74	ROBERT VISSA - Filed notice that the Supplemental Record on Appeal has been certified and transmitted to the U.S.C.A. for the 2nd Circuit.
12- 3-74	Filed transcript of record of proceedings dated July 12, 1974.
12- 2-74	ROBERT WILNER - Filed Judgment and Probation/ Commitment Order - The Deft. is hereby committed to the custody of the Atty. General for imprisonment for a period of ONE (1) YEAR on Count 1, but the execution of the sentence of imprisonment is suspended. The Deft. is placed on probation for a period of THREE(3) YEARS on Count 2.----LASKER, J.
12- 3-74	ROBERT WILNER - Filed Deft's Notice of Appeal from the Judgment of Conviction entered against Deft. on 12-2-74. (m/n to Deft. & Atty.)

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk

By_____
Deputy Clerk

INDICTMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA,

v.

JAMES ADAMS, RICHARD BELANGER, NICHOLAS CALABRO, DOMINIC MECCA, RICHARD PALMER, STEVEN SMITH, GARY STEPHAN, PAUL STEPHAN, ROBERT VISSA, ROBERT WILNER and JOHN DOE, a/k/a "Anthony",

73 CR 1102

Defendants.

----------X

The Grand Jury charges:

1. From on or about the 1st day of August, 1971, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, JAMES ADAMS, RICHARD BELANGER, NICHOLAS CALABRO, DOMINIC MECCA, RICHARD PALMER, STEVEN SMITH, GARY STEPHAN, PAUL STEPHAN, ROBERT VISSA, ROBERT WILNER, and JOHN DOE, a/k/a "Anthony", the defendants, and Gerald Mitchell and Richard Thurlow, named herein as co-conspirators and not as defendants, and others to the Grand Jury known and unknown, unlawfully, wilfully and knowingly combined, conspired, confederated and

DOMINIC MECCA and co-conspirators (sic) Richard Thurlow went to Montego Bay, Jamaica, West Indies by boat.

2. In or about February, 1973, defendants JAMES ADAMS, DOMINIC MECCA and RICHARD BELANGER met and had a conversation in Florida.

3. In or about February, 1973, the defendant JAMES ADAMS paid defendant ROBERT WILNER approximately $12,000.

4. In or about February, 1973, defendant ROBERT WILNER, as agent for Air Seas Charter Service, Inc., purchased a 24 foot Floton Seacraft boat in Ft. Lauderdale, Florida.

5. On or about March 6, 1973, defendant STEVEN SMITH and co-conspirator Richard Thurlow boarded a boat in Miami, Florida.

6. On or about March 7, 1973, defendant STEVEN SMITH and co-conspirator Richard Thurlow possessed approximately 700 lbs. of marijuana on Williams Island, Bahama Islands.

7. On or about May 13, 1973, defendants ROBERT WILNER and JOHN DOE, a/k/a "Anthony", boarded an airplane at John F. Kennedy International Airport in the City of New York and floew to Ft. Lauderdale, Florida.

8. In or about May, 1973, defendant JOHN DOE, a/k/a

"Anthony", and co-conspirator Gerald Mitchell drove from Ft. Lauderdale, Florida to the Rye Town Hilton Hotel in Portchester, Westchester County, New York.

9. In or about May, 1973, defendants ROBERT WILNER, DOMINIC MECCA and JOHN DOE, a/k/a "Anthony", and co-conspirator Gerald Mitchell met at the Rye Town Hilton Hotel in Portchester, Westchester County, New York and had a conversation.

10. In or about June, 1973, defendants ROBERT VISSA and NICHOLAS CALABRO and co-conspirator Gerald Mitchell drove from the State of Maine to Stamford, Connecticut where they met and had a conversation with defendants JOHN DOE, a/k/a "Anthony" and ROBERT WILNER.

11. On or about June 10, 1973, defendants JOHN DOE, a/k/a "Anthony", and GARY STEPHAN boarded a boat in Ft. Lauderdale, Florida.

12. On or about June 11, 1973, defendant ROBERT WILNER and co-conspirator Gerald Mitchell landed an airplane on Long Island in the Bahama Islands.

13. On or about June 11, 1973, defendants RICHARD PALMER and ROBERT VISSA landed an airplane on Long Island in the Bahama Islands.

14. In or about June, 1973, defendants PAUL STEPHAN,

DOMINIC MECCA, NICHOLAS CALABRO, ROBERT WILNER, ROBERT VISSA and RICHARD PALMER and co-conspirator Gerald Mitchell met at Pier 66 Hotel, Ft. Lauderdale, Florida and had a conversation.

15. In or about June, 1973, defendants GARY STEPHAN and JOHN DOE, a/k/a "Anthony" returned to Ft. Lauderdale, Florida by boat.

16. In or about June, 1973, co-conspirator Gerald Mitchell possessed approximately 260 pounds of marijuana.

(Title 21, United States Code, Sections 846 and 963).

SECOND COUNT

The Grand Jury further charges:

In or about the month of May, 1973, in the Southern District of New York, JAMES ADAMS, RICHARD BELANGER, NICHOLAS CALABRO, DOMINIC MECCA, RICHARD PALMER, STEVEN SMITH, GARY STEPHAN, PAUL STEPHAN, ROBERT VISSA, ROBERT WILNER, and JOHN DOE, a/k/a "Anthony", the defendants, unlawfully, intentionally and knowingly did possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately

500 pounds of marijuana.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(B)).

PAUL J. CURRAN
United States Attorney

FOREMAN

MR. LA ROSSA: That is acceptable to Mr. Wilner.

MR. ABRAMOWITZ: All counsel.

MR. SHAW: All counsel, your Honor.

THE COURT: Very good.

All right, gentlemen, how are we going to proceed?

I think what we ought to do is to let each defense counsel go one at a time, but then after an argument has been made I would like to have the government answer them and not wait until everybody finishes to answer eight arguments.

Is that satisfactory to government counsel?

MR. TRUEBNER: Certainly.

MR. ABRAMOWITZ: Your Honor, I would like to make a motion to dismiss Count 1 on behalf of all defense counsel because I think it applies to all defendants. But if any counsel finds any part of my argument insufficient, before the government answers, maybe they would like to add to the argument so that we handle that problem first.

If I might, your Honor, I would like to go over to the blackboard and I would like to start, your Honor, by indicating what this motion is not rather than what it is.

The motion is not based on the insufficiency of the evidence as to any defendant. I think that individual counsel can handle that on behalf of their own clients.

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The chart that I have drawn on the blackboard is not to be considered in any way conceding the sufficiency of the evidence even if you, as you must on this motion, take the government's evidence at face value.

THE COURT: Right.

MR. ABRAMOWITZ: But your Honor will note that the testimony adduced on the government's direct case indicates that only one individual, and that is Dominic Mecca, was involved in every transaction testified to on direct examination by any government witness, and that deals with five trips in the importation of marijuana. That was in August 1971, about which there was testimony that Thurlow, Paul Stephan, Gary Stephan and Mecca were involved.

The next one would be March 1973, about which there was testimony that Mecca, Thurlow, Palmer, Mitchell, Belanger, Wilner and Smith were involved.

THE COURT: Will you repeat those names for me?

MR. ABRAMOWITZ: I will repeat them.

Mecca, Thurlow, Palmer, Mitchell, Balenger, Wilner and Smith.

THE COURT: All right.

MR. ABRAMOWITZ: The next one would be May 1973, about which there was testimony that Mecca, Palmer, Mitchell, Vissa, Paul and Gary Stephan, Wilner, Coviello and Calabro

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were involved. That would be May 1973.

Do you have the names?

THE COURT: Yes. I'm just looking at Coviello. That is Anthony?

MR. ABRAMOWITZ: Anthony, right.

THE COURT: Okay.

MR. ABRAMOWITZ: June 1973, which essentially involved those same personnel as May 1973.

THE COURT: Are there any variations?

MR. ABRAMOWITZ: I don't think so.

MR. SHAW: Yes, there was.

MR. ABRAMOWITZ: I don't think there are. I think between May and June they are exactly the same.

THE COURT: Rather than compare them, read the names.

MR. ABRAMOWITZ: Palmer, Mitchell, Wilner, Paul and Gary Stephar, Coviello, Calabro, Vissa and Mecca.

THE COURT: All right.

MR. ABRAMOWITZ: Then in August 1973, Mecca, Adams and Palmer.

What is not on this chart are, I believe, four or five trips that Mr. Thurlow testified he was involved in; for shorthand sake we will call it Boston group and I believe he had some testimony about the Chicago group, and I

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believe the ... period of that is November 1972 through March of 1973.

THE COURT: Are you mentioning those just for the sake of completeness?

MR. ABRAMOWITZ: For the sake of completeness and also, and I will come back to it later, your Honor, after I finish the presentation, as evidence that there really was more than one conspiracy involved in this case.

The motion to dismiss is based upon Kotteakos against the United States. The citation of Kotteakos is 328 U. S. 750, 1946.

If your Honor will recall, that case involved what has been called the wheel conspiracy as to be distinguished from the chain conspiracy.

THE COURT: Or the spoke conspiracy it is also called.

MR. ABRAMOWITZ: The spoke conspiracy, the wheel conspiracy, as distinguished from the chain conspiracy.

The chain conspiracy would pertain to a situation where we were sitting on trial with the grower, the importer, the retailer, the wholesaler -- excuse me, the wholesaler and the retailer.

The wheel conspiracy generally deals with one central figure and separate transactions involving the hub

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of the wheel.

THE COURT: The last statement I agree with because by definition that is what it is, but when you say, "This," I don't believe the question whether a conspiracy is a Kotteakos or wheel or hub conspiracy as distinguished from a chain conspiracy depends necessarily on the subject matter of the conspiracy, it depends on the relations of the defendants with each other, if any, and really whether they have any with each other or whether a central person --

MR. ABRAMOWITZ: Right.

THE COURT: I am well aware of the Kotteakos case.

MR. ABRAMOWITZ: What I am arguing is you can have a perfectly valid single wheel conspiracy if the rim of the wheel is attached, to complete the analogy.

You could have a hub in the center of a valid wheel conspiracy and have the spokes go out, but if there is sufficient evidence that the acts and people are connected and the rim is, therefore, closed, that could be perfectly valid.

THE COURT: Yes, except to carry the geometric analogy a step further, there just has to be a cross-relationship between the spokes. Spoke number one, I mean the people in spoke number one, don't have to touch the

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people in spoke number two, or something like that.

MR. ABRAMOWITZ: I think they do, to be valid. They have to touch in the sense that there has to be a link between the events.

THE COURT: Yes, there has to be a link between the events, but it could be from A to B to C to D to E, they don't necessarily have to be the way it is on the blackboard at this time.

In other words, your example, which shows August 30, 1973 in the middle, March 1973 and August 1973 on the other side, in order for there to be a chain conspiracy, the government doesn't have to establish that the people who are in the August 1971 episode happened to have contact with people who were in the March 1973 episode.

MR. ABRAMOWITZ: They have to be aware that there was going to be a March 1973 episode and that they were going to be members of that conspiracy.

THE COURT: I wouldn't go so far as to put it that way.

MR. ABRAMOWITZ: Your Honor, let me argue it and then the government can answer.

In United States against Borelli, Judge Friendly indicated that one of the problems with a conspiracy and a government charge of conspiracy is that it is too often thought of as a group of men rather than what it really is,

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which is an act or an agreement.

Your Honor has to decide at thispoint whether there is sufficient evidence to decide that seven men alone with others entered into a single agreement starting in August 1971, contemplating, if not the exact date, but contemplating that there would be a continuous importation of marijuana all the way up until the conspiracy ended --

THE COURT: I don't agree with that. They had to contemplate that they were going to go into business to import marijuana. It might go on for "X" minutes or "Y" years, unless they specified how long it was going to go for, which isn't usually done.

MR. ABRAMOWITZ: The actors in the first event, your Honor, you have to find now contemplated that they would have continued to do the same thing that they allegedly did in August of 1971 until they affirmatively withdrew from the agreement either by arrest or by an affirmative statement --

THE COURT: Yes, I buy that.

(Continued on page 1745.)

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MR. ABRAMOWITZ: Your Honor has to find that in August of '71 there was either by inference or direct testimony an agreement among the participants at that time, which would be Mecca, Thurlow, Paul Stephan and Gary Stephan, that they were to continue to import marijuana on a regular basis with or without the same individuals. And I don't think, your Honor, talking about each trip, any government witness, and that includes Thurlow, Mitchell or Palmer, ever said that "We were going to do this until we got caught," and I don't think you can infer that. I think the evidence is clear that they did this on a once-a-transaction basis. If they were successful they would do it again, and they planned each separate time. They never sat down and planned to do this on a continuing basis for two or three years or for however long it was going to take them to draw from the conspiracy. There is absolutely no evidence of that.

And you have testimony in this case of three alleged members of the conspiracy. Did they sit down and say, "I had a conversation with this defendant and that defendant and we were going to do this forever until we got caught?" That would be the rim on the wheel, your Honor, and that would make it a valid conspiracy. But what have you have here is you have four people in August, '71, in

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one transaction importing marijuana. We skip until March, '73, and you have different people with the same center, different people, not Paul and Gary Stephan in March, but now Thurlow repeats, and you have different people setting up a new agreement in March to import marijuana, and when that is completed you have new people in May agreeing to do it again one more trip, and then finally in June one more trip.

If you recall, Mr. Palmer testified that they did not plan the June trip until after the May trip was completed. And so it is true with Thurlow's testimony. And so it is true with Mitchell's testimony.

b2 There was no one single incident in which either by testimony or inference where any of the alleged co-conspirators sat down and said, "We are going to have one continuing agreement," in words or substance. Your Honor, I am not saying they have to sit down and write a formal contract, but you have to infer they were going to do this on a continuing basis with the same people over a course of time until any one of the individuals withdrew from the conspiracy.

That is exactly what Kotteakos is about. Kotteakos is about one man involved, I think, in that case, in seven or eight separate transactions, but similar, the same crime.

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There was no doubt in Kotteakos that there was sufficient evidence that a conspiracy existed. I am not arguing to you that there is not.

Now, in this case, your Honor, the people are different. We have August, '71, March of '73, May of '73, June and August of '73. And the reason that is so, your Honor, is that the people change. You don't have the same kind of modus operandi that you have in August, '71. There is no plane involved in '71; there is a plane involved in March. They changed a little bit in May because it didn't work, because Thurlow was arrested. In August you have two of the co-conspirators going off on their own without any of the other defendants involved in June, no Thurlow, no Paul, no Gary, no Mitchell. Different people.

Now, your Honor, we are dealing here only with the importation stage, the smuggling itself, and it is like saying that every time a group of people get together and decide to rob a bank, from that you can infer that they had a continuing conspiracy to rob banks in the future. That can only be if there is testimony or evidence to that effect.

There is no evidence that in August of '71 any of the four participants said, "We are going to do this again."

THE COURT: There may be interences that can

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reasonably be drawn from the testimony.

MR. ABRAMOWITZ: Four people get together, commit a crime in August, '71. There is no inference or presumption without any direct evidence from any government witness to say, "We are going to continue to do this."

THE COURT: I didn't use the word "presumption"; I said "interence."

MR. ABRAMOWITZ: I am using the word presumption, because there is no evidence to that effect, and if there is no evidence at this stage, at the close of the government's case, you have to use presumption or infer whatever it is. There is nothing. And that is the spike effect, that you have a co-conspirator testifying as to the August, '71, trip, and if it was so, he would have said, "We came to an understanding at that point that we were going to do this again." But the next thing that Thurlow testifies to is almost two years later, a year and a half later. So you couldn't infer from the evidence of August, '71, that these four people, at least, had a continuing understanding that they were going to continue to import marijuana.

The same way in Kotteakos, a man in the center processed the fraudulent loan applications in a certain year, then two months later did it again, and three months later did it again. The Supreme Court said you cannot infer from

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the first time that he did it that there was going to be one single continuing conspiracy involving different people and involving separate transactions and separate crimes, you can't charge that as one conspiracy. Kotteakos does not say that there was insufficient evidence that the crimes b3 were committed.

THE COURT: As I recall Kotteakos -- and I have had to deal with this issue in other trials, not in a narcotics trial before, but in a stock fraud trial, and so forth, quite a complicated conspiracy that went on over a long period of time, with some people in Chicago and New York, so I am familiar with it. As I recall in Kotteakos-- I may be wrong -- but none of the people in the periphery of the wheel had had any contact with each other. The only contact they had had was with the man in the hub.

MR. ABRAMOWITZ: But they knew that the other people existed. That is the difference. It does not matter that Mitchell may know Wilner, or any other two names -- I am just taking any two names -- that is not the problem in Kotteakos. The problem in Kotteakos was that X who dealt with the man in the center knew that there had to be a Y, but didn't know where Y was. Now, this man was doing it for anybody that asked him to do it. So I don't think that the fact that they know each other is material. That

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goes back, your Honor, to what I said about Borelli.

THE COURT: It makes a substantial difference whether you know somebody or have contact with somebody. Please understand, I think I am a little more sophisticated than you give me credit for. I am not talking about conspiracy as a group of men; I am talking about the inference that people agree when they are aware of each other's activities and they overlap and they are occasionally together.

MR. ABRAMOWITZ: Let me make an analogy and I will finish up the point. The analogy is if I conspire with another person to rob a bank, I don't think just by that testimony alone you can infer that if the two of us rob a bank six months later, that the first time we entered into an agreement to do so that that was on a continuing basis for three years.

THE COURT: Neither do I, but I don't think that is the very best analogy.

MR. ABRAMOWITZ: I think that is what this case is.

THE COURT: I think the difference in the nature of the crimes permit different kinds of inferences, for one thing.

MR. ABRAMOWITZ: Do you see because it is an

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importation case it is different from a bank case?

THE COURT: I think interences can be drawn in an importation case different from a bank robbery.

MR. ABRAMOWITZ: I think you can smuggle in marijuana every single day and not be in a single conspiracy.

THE COURT: I am not saying that. Certainly, if you murder somebody, it would not be expected that you are going to murder somebody every day, unless you were a contract killer.

MR. ABRAMOWITZ: Your Honor understands the problem. I don't think, frankly, you can say just by the fact that in one instance marijuana was imported by four individuals that they had, thereby, a continuing agreement to continue to do it.

THE COURT: I am not saying that just because it is marijuana. I say that the subject you are dealing with may permit different interences than the one which you happen to bring out.

Now, Mr. Abramowitz, I would like to ask you for your reaction to the question of whether Kotteakos requires an all or nothing proposition? Or could it permit in the circumstances of this case finding that although there wasn't a conspiracy as far back as 1971, there was a conspiracy starting in March of 1973 which falls within

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the period mentioned here and which kept up from there on. I am talking now as a matter of theory.

MR. ABRAMOWITZ: After Kotteakos there was a case called United States v. Berger which talked to this issue as to whether if the court found multiple conspiracies whether it was a fatal variance or not, and in that case it said when there were two separate conspiracies found, adequate instructions could be given to the jury to correct the variance. Kotteakos involved eight. Berger came before Kotteakos. Kotteakos involved eight separate conspiracies, and the Supreme Court said that that was too many, that the jury would be confused. We have five here, and I submit that it comes closer to the Kotteakos situation, where the jury would be terribly confused. Let me explain why.

b4 THE COURT: That is an interesting answer, but it is not an answer to the question that I asked or wanted to ask.

MR. ABRAMOWITZ: I think the count has to be dismissed because there are five conspiracies and it comes close to the eight in Kotteakos. That is the answer to the question.

THE COURT: I don't think I made myself clear as to what my question is. My question isn't whether it must be dismissed because I might find there are multiple

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conspiracies; my question is whether if I were to conclude that the evidence is such that if the government has not even with the inferences in its favor proven that the conspiracy charged here goes back to August of '71, but that it has proven sufficient for its purposes at this time that there was a conspiracy starting in March of '73, and carrying forward the mere excision of August, 1971, as I recall Kotteakos, would not mean that all the others had to be thrown out because I found that August, '71, was not proven?

MR. ABRAMOWITZ: I agree. I think that is a different question.

THE COURT: It is a different question.

MR. ABRAMOWITZ: If you find that instead of one conspiracy charged, there were five proven. Kotteakos is particularly a variance question. So it is perfectly possible for your Honor to cut off any one of the spokes for insufficiency. I am not arguing that now, and I think you can do that.

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THE COURT: Excuse me. Mr. Sparrow?

MR. SPARROW: May Mr. Calabro be excused to take some medication?

THE COURT: Yes.

And, Mr. Hoffman, you have asked the court's

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assistance and indicated that you are trying to subpoena some evidence and are trying to get it here as quickly as possible. My office has a report by the person you contacted.

MR. ABRAMOWITZ: I just want to make clear what I am talking about is variance, and not sufficiency. So the answer to your question is, yes, it can be done if your Honor finds on any one of the spokes the evidence is insufficient. Assuming the sufficiency, there are five, and that is close to the eight in Kotteakos, and requiring a dismissal. That is bolstered to show that there were separate conspiracies. It is bolstered by Thurlow's participating in other transactions with the Boston group and the Chicago group during the time when he was supposed to be a member of this one conspiracy importing marijuana into the country. I think that is evidence that these were separate transactions, that they got together and planned them one by one, and if they were successful they did it again, but there was never a single agreement by the people on trial and the named co-conspirators to do this on a continuing basis, and the testimony is insufficient on that.

MR. TRUEBNER: If your Honor please, we will submit at the outset that the Kotteakos argument is more difficult

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to be made when dealing with a conspiracy of this nature. Normally it is made with the so-called chain type of conspiracy when you have importers, wholesalers and retailers, where you have a vertical chain. Here we believe there is evidence that all these people were dealing at the same level, namely, the importation of it, and their participation, of course, varied from trip to trip.

Now, on the variance question, the most recent statement of the Second Circuit on this issue is U.S. v. Cirillo and others, decided May 7, 1974, and Judge Mansfield deals with this very question in a narcotics case, and he says, if I may quote:

"Even assuming there was a variance between the government's proof and the indictment, we are directed to no specific prejudice arising from the variance and we are convinced that there could have been none."

THE COURT: This is a conspiracy question?

MR. TRUEBNER: Yes, sir.

"Unlike Kotteakos v. United States, which involved 36 alleged co-conspirators and some 8 separate conspiracies to defraud the government in relation to FHA loans, here there were only 8 alleged co-conspirators and at most 2 separate conspiracies, each of which was proved beyond a reasonable doubt by evidence relating only to it."

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And [illegible]cen on to discuss the cautionary charge of t[illegible] judge asking the jury to focus its attention on t[illegible]idual guilt of each person.

[illegible]r, we would read this that the remedy is not to d[illegible]e indictment. Indeed, I know of no case, no go-ca[illegible]reaKos case where the conspiracy has been dismi[illegible] the close of the government's case.

[illegible] COURT: On the whole, I think trial judges leave [illegible] to the Court of Appeals. It does not mean that I don't [illegible]k the trial judge does not have an obligation to rev[illegible]e evidence very seriously and consider whether there [illegible] defect.

[illegible]S. TRUEBNER: We believe here, if your Honor please, [illegible] starting in August, 1971, and up until [illegible]ugust [illegible]1973 we have a series of very similar transactions [illegible] which [illegible]rtain participants come and then may drop out [illegible] a trip and then they reappear, which we believe supports [illegible] inference.

THE COURT: That is what I tried to indicate to Abra[illegible]tz by talking about contacts and so forth. [illegible] is a [illegible]ertain degree of interweaving.

[illegible]rst of all, I think it is reasonable that the [illegible]overn[illegible]ould state what its position as to whether [illegible] is [illegible] or more conspiracies here. So I ask you, what

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is the government's position?

MR. TRUEBNER: We believe there is a single continuing conspiracy to import marijuana into the United States.

THE COURT: The next question is, if that is so, what is the thread that you think that connects, let's say, August, '71, with March, '73. I don't think anybody could dispute the fact that the March, May, June triad -- by that I don't mean there are three separate conspiracies, but three separate trades -- have a certain degree of inter-unity. But August is like a star in the clouds further out in the heavens there.

What is the government's position on that?

MR. TRUEBNER: August, I would agree with the court, does not stand in the same position as the other spokes, as Mr. Abramowitz so eloquently diagrammed them on the board. We believe that Thurlow as the so-called boatman is an important theme in this. Thurlow and Mecca, really, are in both the August, '71, and also in the March, '73, transactions. Now, they may have been operating independently or as parts of other conspiracies during that same period, but that does not necessarily mean they could not have entered into the conspiracy with which we are dealing in this case.

THE COURT: I think Mr. Abramowitz would credit

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them with the ability to be in two conspiracies at once.

MR. ABRAMOWITZ: I would, your Honor, but it does not detract from what I said.

MR. TRUEBNER: We would submit it was almost a merger in there in between Thurlow as he went from whatever other groups he was dealing with to the Mecca-Mitchell-Wilner group, which really firmed up in the March, '73, trip.

THE COURT: Thurlow's activities in Boston or Chicago does not seem to me to help or hurt anybody. It may be he was hopping all over the place. It may affect his credibility. On this point it doesn't prove very much.

I would like to ask the government once again, what about August, '73, in which Palmer seeks to be an independent contractor.

MR. TRUEBNER: The common thread there would be the fact that two named defendants, Mecca and Adams, were participants with him there, and also Anthony. It is possible that other defendants may have argued that they had withdrawn by that point. But as the court well knows, withdrawal from a conspiracy must be shown either by an arrest or some kind of affirmative act, and, certainly, at this stage there is no indication that any of the defendants did, in fact, withdraw.

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THE COURT: All right.

MR. TRUEBNER: So absent any evidence of a withdrawal, we believe that the inference that this was another trip in the line is surely permissible.

THE COURT: Except I have to review Mr. Palmer's testimony as to what he did with the stuff when he got back.

But am I incorrect in failing to recall that any of the defendants here ever benefited from that trip? Is there any evidence that they did?

MR. TRUEBNER: I believe the August trip was the one in which he received one-quarter of the proceeds estimated by him at approximately 25,000. I thought the inference was that the other quarters went to Adams, Mecca and Anthony.

THE COURT: Yes, I agree, but none of them is before me, of course, which doesn't mean that theoretically it couldn't apply to the defendant's before me, but it certainly makes it questionable.

Mr. Abramowitz, what is it?

MR. ABRAMOWITZ: Your HOnor, with due respect, I think what you are doing by saying what if we cut off this spoke and cut off that spoke is really saying that only those spokes that involve the seven people on trial are the single conspiracy that the government alleges.

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THE COURT: No. It may sound like that but that isn't what I have in mind.

For example, when I talk about August 1971, and I am thinking out loud to be perfectly frank, I am thinking about the distinctiveness of its position in time, nothing to do with who was there.

MR. ABRAMOWITZ: Right.

THE COURT: In fact, two of the defendants are in the August 1971 situation.

MR. ABRAMOWITZ: I agree with that, your Honor. The point is the government is saying that it is part of the same single conspiracy.

THE COURT: I know they are.

MR. ABRAMOWITZ: And I don't think they can correct the fact whether it was one single conspiracy or five by saying, "I will cut off one spoke and the other spoke and the other people are in the same time period and we have one conspiracy."

I don't think the government contends that.

THE COURT: I think like a sculptor, I can say a certain statue is in the stone and another statue is in the stone.

MR. ABRAMOWITZ: I didn't read the Cirillo case,

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which apparently came down when the trial started, but Mr. Truebner indicated the Court found two separate conspiracies. A finding that that was not dismissable is consistent with the Berger case. Kotteakos, where there was a finding of eight separate conspiracies, had the counts dismissed, and I think the five here come close to the Kotteakos case.

THE COURT: I understand.

MR. TRUEBNER: If your Honor please, we would submit the only basis on which to dismiss a conspiracy count at the close of the government's case would be if there were substantial prejudice from a spill-over effect.

Say you had an "A" group that were running around murdering people and doing all kinds of horrendous things and a relatively clean "B" group otherwise, and, in fact, the activities of the "A" group might reflect adversely on "B" group, then you would be getting into the situation where there would be prejudice to submit the case to the jury on the single conspiracy.

THE COURT: There is another kind of prejudice that could occur which has been suggested by Mr. Abramowitz' argument and that is the fear of unmanageability of the instructions you might think you would have to give to the jury.

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But I am not suggesting at the moment that I think even if I were to find five conspiracies that I think as a matter of law it is unmanageable.

MR. ABRAMOWITZ: The only point is, your Honor, you took all this evidence subject to connection. If that count is dismissed, you have testimony about events happening in January, February and March about which my client, for example, was not involved and is going to be under your instructions, if you find one conspiracy, held accountable for, and that is where the prejudice is.

That would apply to every one of the defendants when they are not present. They are being held accountable for acts and conduct of other people said to be in the same one single conspiracy with them and if there is no one single conspiracy that principle of evidence cannot apply to them.

THE COURT: Very good. Are we finished on this issue, then?

MR. ABRAMOWITZ: I think so, your Honor.

THE COURT: All right. I have indicated I am reserving decision.

I will now proceed beyond this.

Have you got any order, gentlemen, on how you want to proceed?

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MR. ABRAMOWITZ: The usual order.

THE COURT: All right. Then who is first?

MR. LA ROSSA: May it please the Court, the defendant Robert Wilner, moves under Rule 29(a) for a motion for a judgment of acquittal on both Counts 1 and 2.

I think your Honor is fully aware of the evidence and I am not going to recount it. Since your Honor is going to reserve decision I see no real reason for argument unless your Honor wishes to ask me some questions.

THE COURT: It suits me.

Do you want to make any comment on the evidence against Mr. Wilner or are you satisfied?

MR. TRUEBNER: No, your Honor, we have nothing. I'm sorry.

MR. THAU: Your Honor, just one word, if I might, on the argument made by Mr. Abramowitz in connection with the danger of a spillover.

It occurs to me that along with the defendant Smith, Belanger is the one who has most to suffer from the possibility of a spillover effect, because if you recall the evidence against him, it seems to center around the second part of January, a bit in February and the very beginning of March, and there is no involvement whatever in the August 1971, May 1973, June 1973 or August 1973 matters, so that

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conspiracy and there are too many conspiracies for the court to be able to present the matter to the jury in a fair fashion.

I conclude that Kotteakos is not applicable to this case, but I do also conclude that the evidence with regard to the events relating to August, 1971, and the events relating to August, 1973, are insufficient to put before the jury as part of the conspiracy alleged in this indictment. I, therefore, intend to instruct the jury I believe that they can find that a single -- I am not going to tell them that they should find, of course -- a conspiracy during the period commencing roughly the beginning of 1973, that is, January, 1973, and running through to the month of June, let's say, and I am specifically instructing counsel not to refer to the events of August, 1971, or August, 1973 -- I guess my instructions are basically to the government counsel -- as I will also tell the jury not to consider any such testimony that may be in the record, at least unless government counsel points out to me how such a reference would be, number 1, logical in the circumstances and, number 2, without prejudice to any of the defendants who are on trial.

As to the motion for judgments of acquittal under Rule 29, I find under the rule of this circuit that all

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interences must be made favorably to the government at this time. All such motions are denied, with the exception of the motion of Steven Smith with regard to count 2, which is granted.

MR. SHAW: Thank you, your Honor.

MR. LA ROSSA: Will you also decide these motions as we rest under the Taylor decision beyond a reasonable doubt so we don't have to take another recess?

THE COURT: You mean at this time will I?

MR. LA ROSSA: May we deem that all defendants have rested at this time and renew our motions under Rule 29?

THE COURT: Yes.

MR. LA ROSSA: And ask your Honor to make the decision now based upon United States v. Taylor beyond a reasonable doubt.

MR. ABRAMOWITZ: Before your Honor does so --

THE COURT: You may ask for that.

MR. ABRAMOWITZ: I would like to point out the case cited by Mr. Truebner yesterday, United States v. Cirillo, while I don't think was applicable to the Kotteakos point is applicable with respect to the two reversals in that case to my sufficiency point on Gary Stephan.

I believe that the two defendants whose convictions were reversed for insufficient evidence were ones where

there was evidence that the two defendants were present and ambiguously or suspiciously participated but against whom there was no evidence that they ever had a conversation involving narcotics, and the Court of Appeals reversed their conviction and said that the spill-over effect from the hearsay testimony that was permitted to be used against them required a reversal.

So I would cite that case in support my motion that the evidence to find Gary Stephan a member of this conspiracy was insufficient, therefore, the hearsay evidence should be stricken.

Secondly, your Honor, I believe that the issue of single conspiracy or double conspiracy, once it is satisfied by your Honor, is still a jury question.

THE COURT: Oh, yes.

MR. ABRAMOWITZ: I have such a request in my request to charge that if the jury should find multiple conspiracies they can acquit on count 1.

THE COURT: They can acquit, yes.

MR. ABRAMOWITZ: For that reason alone, if there is a multiple conspiracy.

MR. LA ROSSA: They must.

MR. ABRAMOWITZ: Must acquit.

MR. LA ROSSA: If they find multiple conspiracies,

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they must acquit.

MR. ABRAMOWITZ: Secondly, on behalf of Gary Stephan, I am anticipating Mr. Hoffman, I believe, since the August, 1971, transaction only involves Gary Stephan and Paul Stephan with respect to the defendants on trial, I move for a mistrial on behalf of --

MR. HOFFMAN: No.

MR. ABRAMOWITZ: I do for Gary Stephan.

I believe your Honor has already stricken it from the record by your ruling. The evidence about 1971 has been stricken from the record.

THE COURT: I haven't stricken it in so many words, but I consider striking it. But what is it that you move?

MR. ABRAMOWITZ: I assume by your Honor saying the evidence concerning August, 1971, was insufficient that you are striking it from the record.

THE COURT: It doesn't necessarily follow, but in any event --

MR. ABRAMOWITZ: In any event, on behalf of Gary Stephan, I am moving for a mistrial because the evidence of the August, 1971, transaction which only involved Gary and Paul Stephan from the witness Thurlow was so prejudicial that any instruction to counsel or any instruction to the jury to disregard that testimony at this stage I think

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would be unheeded and would prejudice Gary Stephan and Paul Stephan so severely when considering the evidence of the other ones that I think there should be a mistrial.

THE COURT: Of course, I thought of that. I am persuaded, first of all, that they will be able to follow the instructions, secondly, they will zero in on the evidence of the roughly speaking January and March, May and June, 1973, events and, thirdly, it is a fact which I think is fair to note for the record in case this matter is appealed that the testimony as to August, 1971, occurred at the very outset of the trial and being realistic about it I think it may have faded into insignificance in the memory of the jury's mind by this time, but I don't pose this as a professional psychologist.

MR. HOFFMAN: If it please the Court, one, I join in that motion on behalf of Paul Stephan.

THE COURT: Therefore, your motion is denied, by the way.

MR. HOFFMAN: Secondly, I would move that the Court strike that testimony.

THE COURT: What is the significance or the value of striking the testimony?

MR. HOFFMAN: I think that when the Court said that that testimony is stricken, it makes a difference

to the jury than if you just say don't consider it.

MR. ABRAMOWITZ: If the jury calls for the testimony, if the evidence is not stricken it can be read to them.

THE COURT: What I would like you to do, gentlemen -- I will leave this to Mr. Abramowitz and Mr. Hoffman to be the moving forces in it -- is to review the testimony in the record that you would like to have stricken, show it to government counsel and if there is a disagreement about what it is or anything I will rule. I will rule in any event. I will probably grant your motion, but I want to see what I am dealing with.

MR. TRUEBNER: Would your Honor entertain an application to admit the events of August of 1971 as prior similar acts against Paul and Gary Stephan?

The difficulty with striking it, it seems to me the defense may well want to argue those events, August, 1971, and August, 1973, as to the credibility of Thurlow. He testified that he made --

MR. HOFFMAN: We won't argue that.

MR. ABRAMOWITZ: We are asking that it be stricken, Mr. Truebner, so we are not asking --

THE COURT: Mr. Abramowitz and Mr. Hoffman commit themselves not to go back to it and that is one thing.

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Of course, if they do go back to it, and they are going to be making their summations before you, why then you certainly would be free to comment on it.

MR. ABRAMOWITZ: Your Honor, I have one other request.

In informing the jury that you are asking them not to consider August, 1971, I would appreciate it if you did not zero in -- this is without waiving my previous motions -- that you do not zero in as to exactly what the testimony was, for example, saying that is the trip involving Paul and Gary Stephan.

THE COURT: Yes.

MR. THAU: Pardon me, your Honor, since we are discussing --

MR. LA ROSSA: May we stay on this one point for a moment so we can have other defense counsel deal with this?

THE COURT: Yes.

MR. LA ROSSA: May it please the Court, the grand jury indicted here and neither Mr. Truebner or you had anything to do with it, or Mr. Pykett.

The indictment alleges a conspiracy from January, 1971, to the date of the filing of the indictment. I submit to the Court that this jury, under Kotteakos

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and subsequent cases, has a right to determine whether there is a multiple conspiracy in this case as the government presented it to the jury and that your Honor, I most respectfully submit, has no right to pair the conspiracy as it is, that this jury -- first you must make the determination whether there is a multiple conspiracy, and I submit most respectfully that you just did so when you said that, "I am not allowing the 1971 testimony to go before this jury." In effect, you are saying it had nothing to do with this conspiracy, therefore, I am not going to permit it against the two Stephans.

I submit that on Mr. Wilner's behalf this jury must acquit on count 1 based upon the multiple conspiracy theme. It was objected to at the beginning as having nothing to do with this conspiracy, the evidence was permitted to go before the jury and I think now that your Honor has an obligation to determine whether or not that is part of this conspiracy and, in effect --

THE COURT: I have determined. I agree with you.

MR. LA ROSSA: Then I submit you must dismiss count 1.

MR. LANNA: I agree with Mr. La Rossa.

THE COURT: I am sure you all agree.

MR. HOFFMAN: I join in the motion.

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MR. LA ROSSA: Your failure to do so, sir--

THE COURT: To do what?

MR. LA ROSSA: To dismiss count 1, I submit, does not take away from the jury their obligation to determine whether the 1971 act is part of the multiple conspiracy, and I submit with all the problems that this raises as to the Stephans, I think that is what the problem here is, they should be severed because it shouldn't be introduced against them, but by the same token we have a right to argue the multiple conspiracy theme to the jury with respect to 1971, so I object to the court's rulings.

MR. THAU: Belanger does as well, your Honor.

MR. SPARROW: I might indicate that these are precisely the positions I was going to take on behalf of Calabro as to the August of 1971 and 1973 incidents.

b4 MR. LANNA: I feel the same way.

MR. SPARROW: I might also indicate further that since the government takes the position that the conspiracy was a continuing one right to the date of the indictment, my position is that even the activities of Palmer in November, which predates the indictment when he made trips on his own and he being a member of these conspiracies, are part of this thing and make it an additional multiple

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aspect of the indictment.

THE COURT: I don't agree with that at all, nor do I at this point feel that the government is required, because an indictment specifies a certain period, to establish that the conspiracy which it has proven need have covered the entire period.

MR. LA ROSSA: Nor do I. I agree with your Honor's remark on that. But they chose to put the 1971 activities in as part of this conspiracy.

THE COURT: Yes. Gentlemen, I am not going to change my ruling. I don't mean to over-simplify the difficulties that are presented by a case like this. I have indicated even to the jury that I realize there are. I think justice can be done here. I think I can put the facts fairly and squarely before the jury and see to it that they are presented with the questions which I understand the law to require them to decide and if the higher court, if there are convictions, disagrees, we will have to meet that issue when the time comes.

MR. HOFFMAN: One last thing, your Honor, that I started to say a while ago.

As to the motions that we all put just now before the court concerning dismissing various counts at the end of the entire case, which goes to beyond a reasonable

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doubt, I just want to put out to the court that as to Paul Stephan on the second count, the possessory count, on page 1661, lines 16 through 19 of yesterday's testimony, Mr. Palmer was asked:

"Q Would it be fair to say that the first time, according to your testimony, that you met Paul Stephan was on a darkened air strip in Jamaica in June of 1973?

"A That would be correct, yes."

Again he was asked, "Prior to that night in June, you never met Paul Stephan, correct?"

His answer was, "Prior to that night, no."

The May trip is the trip that the marijuana allegedly came into the Southern District of New York and he made a reference to the fact that on his direct that on that trip his plane was loaded and Paul Stephan was there. The first argument was obviously he didn't say Paul Stephan did anything but appear there. But over and above that, on cross-examination he now admits that it was not the May trip, it was the June, 1973, trip and there was a June, 1973, trip in Jamaica where the plane was loaded.

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THE COURT: I notice that. I think there is a conflict in his own testimony which is precisely a question for the jury. I think they can think he was mixed up or

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not, either way.

MR. HOFFMAN: My argument, of course, is that a jury with that type of conflict should not, beyond a reasonable doubt, should not be allowed beyond a reasonable doubt --

THE COURT: I understand your point, but I don't agree.

MR. HOFFMAN: Thank you, your Honor.

MR. SHAW: Your Honor, a housekeeping chore.

In regard to count 2, will it be announced to the jury when they come in that that count has been dismissed against my client?

THE COURT: Whenever you want me to announce it.

MR. ABRAMOWITZ: Your Honor, I have two --

THE COURT: My own feeling is that it would single things out for the rest of the defendants if I announced it at that time.

But I think it would be better is when you get up to make your summation I would then state that for reasons with which the jury is not concerned Mr. Smith is no longer involved in count 2 and, therefore, your summation will deal only with count 1 as to him.

MR. ABRAMOWITZ: Your Honor, I think I had two motions to strike overt act.

THE COURT: Yes. Those are denied.

I haven't had a chance to look at the indictment. I want to see if there are any overt acts referred to in the August, 1971, or August, 1973, situation. Those I think should be stricken.

MR. SPARROW: Judge Lasker, I do have a motion on behalf of Calabro which I feel is rather important and this does deal now with the possibility or the fact or position that we will rest on the testimony adduced against Calabro and this is at the end of the entire case.

My motion is, of course, under the rule for a directed verdict of acquittal as to the defendant Calabro specifically as to the second count, it being my position that even though you may well have chosen to regard the prima facie aspects of the testimony as sufficient, I think that the government has not raised its testimony to the stature of proof beyond a reasonable doubt as to his possession of the fruits of the May trip, because at no point prior to the inception of the May trip does Calabro indicate as having knowingly entered into and participated in any of those preceding actions in the conspiracy, that what is sought to be done by the government is nunc pro tunc, as it were, they are trying to say because he walked into a house where this pot was in

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Connecticut after the fact that at that point his comment, which is certainly equally susceptible of innocence as of guilt when he says, "Get the stuff out of here," would not be sufficient to create a reasonable doubt as to his possession.

You cannot assume that by that comment, which, as I say, is equally susceptible of innocence as of guilt, he accepts, acquiesces and becomes part of the possessory situation which existed in New York in this district some time prior thereto.

For that reason I feel that count 2 as to the defendant Calabro has not been established to the point that it may be regarded as a matter of law as proof beyond a reasonable doubt.

THE COURT: Mr. Pykett, do you want to answer that?

MR. PYKETT: Well, your Honor, we certainly don't contend that Mr. Calabro had actual possession of the marijuana here in New York. If he had possession it was constructive possession, and whether he had constructive possession would be a function of whether or not he was a member of that conspiracy at the time that the actual possession here in New York took place.

I would say whether or not he was a member of

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the conspiracy at that time is a question for the jury.

THE COURT: Is it the government's position merely being a member of the conspiracy you automatically have constructive possession?

MR. PYKETT: As a member of the conspiracy they are liable for the substantive acts of their co-conspirators.

THE COURT: You mean on an aiding or abetting theory or on Pinkerton?

MR. PYKETT: Yes, your Honor.

THE COURT: I think we are going back to the same thing. It all has to be knowing and wilful and the real question is what does the evidence add up here against Calabro. Does it, as Mr. Sparrow says, add up to at the best 50 per cent either way, in which case I would state that the standards of beyond a reasonable doubt have not been met or could not be fairly concluded by a juror, or does it add up or can the government argue that the evidence has been established beyond a reasonable doubt against Calabro?

I think it is a serious question.

MR. SPARROW: I might just add, there has been no testimony whatsoever of Calabro having said or done anything about entering that conspiracy before the time he walks into that room where they have brought the

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stuff from New York into Connecticut.

It there had been anything to show that he participated or knowingly entered into the conspiracy prior to this, I would feel there is far more substance to Mr. Pykett's comment of a few moments ago. But you cannot after the fact say that he entered the conspiracy at that point and now he aided and abetted in bringing something in which he tells them get it out of here.

THE COURT: Mr. Sparrow, what number are you in summation?

MR. SPARROW: I am number 2 in summation, sir.

THE COURT: I think we better settle this right now, then.

MR. PYKETT: I would say it is a question for the jury whether or not he was a member of that conspiracy on the date it was possessed here in New York and it was taken immediately from New York to Calabro's house in Connecticut, and I would say even though that is the only evidence that the government has presented with respect to the date which Mr. Calabro joined this conspiracy, the jury can still infer because he was living in Connecticut with Vissa and they chose to bring the marijuana to that house that Calabro lived, a member of the conspiracy on the date --

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THE COURT: Vissa was clearly a member of the conspiracy by that time, was he not?

MR. SPARROW: Vissa had apparently been testified to as being a member, but not a word about Calabro being in it.

THE COURT: I am bringing Mr. Vissa into this because of the fact that Vissa and Calabro lived together and Mr. Pykett has just argued the stuff was brought to Calabro's house, but I am trying to think in my own mind if there was testimony that Vissa had already participated, in legal phrases, by that time so one could argue or a juror could argue it was Vissa's house they were bringing the stuff to, not Calabro's.

MR. SPARROW: That is what the testimony was specifically out of Mitchell's mouth, that it was Vissa's house, and it was not until a few witnesses later that someone commented that Calabro lived with Vissa.

THE COURT: I am prepared to rule on the motions at the end of the presentation of the evidence and all such motions are denied, except the motion of Mr. Calabro as to count 2, which is granted.

MR. SPARROW: Thank you, sir.

MR. THAU: Your Honor, may we settle one last item on the 1971 matter. I tried to jump in when this was

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being discussed.

Without waiving my joining Mr. La Rossa's objection, in the context of your Honor's ruling concerning it, I would now ask that there be stricken any testimony concerning 1971 because Thurlow--

THE COURT: It has already been requested by other counsel.

MR. THAU: This applied to August.

Thurlow said, and I think he was mistaken, that he saw or met Belanger in October or November of 1971.

THE COURT: Mr. Thau, I understand the difficulties that we are all faced with because of the fact that these events, I mean, my ruling having just been made and so on, but I can't strike testimony in the abstract.

If you want to review the record, of which you have a copy, and find what you want me to strike and show it to government counsel, I will be prepared to rule on it.

MR. TRUEBNER: Do you want us all to rest in front of the jury in sequence and bring them in?

THE COURT: I think that would be proper.

Let me just finally rule with regard to overt acts.

Overt act 1 is stricken.

I guess that is the only one that does not fall

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within the time period that I have found to relate to the conspiracy.

MR. ABRAMOWITZ: Your Honor, what about requests to charge?

THE COURT: What number are you?

MR. ABRAMOWITZ: 3.

THE COURT: After the first two we will take a break and I will look at this.

MR. LA ROSSA: May we ask for a personal favor just as we are going out? May we use your transcript while we are making a few notes at the table while we are sitting in court?

THE COURT: Yes.

See if you can get along with Mr. Thurlow's.

MR. HOFFMAN: In view of the fact that I am not going to be summing up until tomorrow, can I be excused for an hour and a half?

THE COURT: Yes.

MR. SHAW: Your Honor, I also have a problem. I would like to be excused for a little while.

THE COURT: All right.

(In open court; jury present.)

THE COURT: I hope this will be the last time. I apologize to you for having kept you waiting. I asked

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you to come in at 10 o'clock.

Actually, counsel and I started at a quarter to 10 to deal with the substantial legal questions which arise in a case like this and I have had to rule on them. I thought we would have concluded them yesterday afternoon, but we did not.

I now call on the government.

MR. TRUEBNER: If the Court please, the government has no further witnesses and we rest.

THE COURT: Very well.

MR. LA ROSSA: May it please the Court, the defendant Wilner rests.

MR. THAU: The defendant Belanger rests.

MR. SPARROW: May it please your Honor, the defendant Nick Calabro also rests.

MR. ABRAMOWITZ: May it please the Court, the defendant Gary Stephan rests.

MR. SHAW: May it please the Court, the defendant Stephan Smith rests.

THE COURT: Good.

MR. LANNA: Lastly, the defendant Robert Vissa rests.

THE COURT: Ladies and gentlemen, that means that the presentation of evidence in the case is concluded.

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MR. ABRAMOWITZ: Excuse me, your Honor. I believe that Mr. Hoffman has one open matter and he is not here and I don't believe -- I think he rests tentatively.

THE COURT: Let me explain to the jury in that regard, then --

MR. LANNA: If your Honor please, only one last item which slipped my mind momentarily and that is a stipulation we discussed.

I think it is stipulated between counsel for the defendants, the defendants and the government that if testimony were to be adduced it would indicate without any contradiction that on the date of the arrest of Mr. Palmer, and I believe that was December 12th of 1973, that was effected with enforcement agencies of both the federal government and the local Police Department of the Village of Port Chester of the State of New York.

Thank you, your Honor.

MR. TRUEBNER: The government so stipulates.

THE COURT: It is true, Mr. Hoffman, by the way, for reasons I will explain in a moment, is not here right now, may wish to put in one piece of evidence and the government counsel and defense counsel and I have agreed that we should not hold up the progress of the trial until he is able physically to secure that piece of evidence,

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which will take a little while, so that may be done hereafter. But other than that, all of the testimony, all of the exhibits and everything else are now part of the record and presentation of evidence is concluded.

I think I told you at the outset of the trial, which seems quite a long way back and, therefore, I am not sure whether you remember or not, that when we did conclude the presentation of evidence the order of procedure would be for all counsel to address you in what is known as a summation indicating what they believe has been proven or not proven in this case and I will then, of course, instruct you as to the law and then you will deliberate with regard to the case.

The custom in this court is that in delivering summations, defense counsel make their summations first and the government, which has the burden of proof in this case, will address you last.

Defense counsel are ready to commence their summations. They have agreed on the order in which they will present them and I am entirely satisfied that they should present them in such order as they wish.

There are going to be, I believe, five summations by defense counsel today. Tomorrow we may start a little bit early to get done what we want to have done, there

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will be two summations by defense counsel and the government would also sum up and I will also charge you, and I hope that you will be able to commence your deliberations tomorrow.

We will have to stick to our knitting. I don't want to restrict, if it is at all avoidable, the amount of time spent by anybody in summation, but I do ask them not to make them any longer than they believe in the interests of their client, bearing in mind there are so many of you and the jury has been working on this case for a long time.

Gentlemen, I call on defense counsel to commence with their summations.

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Just one thing before you actually address the jury.

Again, I probably stated this to you at the outset of the trial, but I can't remember whether I did, however accurate the statements of counsel may be in their summations, and I expect them to be accurate. Nevertheless I want to remind you that you have now heard or you have seen in the form of exhibits all the evidence in the case. All that counsel are doing will be to analyze the evidence for you as they see it.

But what they say in their statements as to the facts does not constitute evidence. You ladies and gentlemen, as I will advise you more formally in my instructions and as counsel will remind you from time to time in their summations, you people are the judges of the facts in this case. It is your recollection that controls. If during your deliberations you have any doubt or argument among yourselves about the facts, you will be able to go back to the record and ask for it to be read to you, although we hope you remember the facts. And I make this statement solely so that you understand the purpose and function of summations.

MR. ABRAMOWITZ: Your Honor, there is one minor matter. I hate to be an obstructionist, but can we meet with you at the side-bar for one minute?

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THE COURT: All right. And I hope this is the last time.

(At the side-bar.)

MR. ABRAMOWITZ: I would appreciate it, your Honor, if you would instruct the jury that you have ruled out the August 1971 incident before summations begin.

THE COURT: All right.

MR. ABRAMOWITZ: Then, when we get the details--

THE COURT: Without reference to who was involved.

MR. ABRAMOWITZ: That's right. Thank you.

(In open court.)

THE COURT: Ladies and gentlemen, for what I guess can most easily be called technical legal reasons, I have ruled that the reference in the indictment to events of August 1971 or in the record are to be disregarded by you when you come to assessing the evidence here, and for that reason counsel have been instructed not to deal with the testimony as to that period either and won't be referring to it in the summations, and therefore I want to make that explanation.

MR. LANNA: May I proceed, sir.

THE COURT: Yes.

MR. LANNA: If it please the Court, counsel for the government, counsel at the defense table, ladies and

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cerning this boy, please come back into this courtroom today, if you possible can, and let him know that so that he can know where the future of his life will be and not have to spend three days worrying about it and agonizing over it with he and his family.

Thank you very much for your time and consideration.

THE COURT: Thank you, Mr. Hoffman.

MR. HOFFMAN: Thank you.

THE COURT: Mr. La Rossa.

MR. LA ROSSA: May it please the Court, Mr. Truebner, Mr. Pykett, my fellow defense counsel, our clients, ladies and gentlemen of the jury.

One more long-winded lawyer for as short as he can make it.

A number of things were asked of you in openings, and, basically, they involve your attention, your keeping an open mind, your not making any decisions, and respect for your oath. I think all of you have done that. I think you have done it because I have looked over at you many times while you were intent on either direct examination or cross.

Now, each of us has a role in this courtroom. Most of us have chosen ours. We have chosen to become professionals, whether it be the court reporter or the clerk

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or Judge Lasker or myself or any of the lawyers. But you, by your willingness to serve -- and I do mean willingness to serve because we know how many jurors escape through the system and never wind up in the box -- have agreed to become the sole and exclusive triers of the fact. You have taken an oath here that you will truly decide this case based not upon suspicion or surmise but upon the facts and the law as applied to this case. You have agreed from the beginning that you will respect the law that Judge Lasker gives you in his final remarks to you and you have agreed to make your determinations based upon those principles.

Now, you have heard the principles many, many times. Some of them we consider safeguards, some of which we consider the foundation of our criminal system of jurisprudence. But before I even mention any of them, let me say this to you:

Only the 12 of you will know whether those principles were observed. Only the 12 of you will know whether you have considered them just words.

You see, when you go into that room by yourselves and deliberate, no one is permitted to listen, to be present nor to really find out what happened in there. So if you walk in there some time later today and one of you says to the other, "There is an indictment in this case, therefore

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somebody must have done something wrong or the government wouldn't be prosecuting this case if they didn't think they were right, or where there is smoke there is fire," or any of those silly kind of things, then only you know that you have violated the oath that you took here. Then your only problem is living with yourselves. Because I am not going to stand up here and tell you that I want sympathy from you, I am not going to beg for Robert Wilner, but I am going to demand from you that you follow the oath that you promised as you promised; nothing more.

You see, after hearing all the evidence in this case and the Judge's charge, after applying the law to the facts, if you believe beyond a reasonable doubt that each essential element of each count has been proven beyond a reasonable doubt against Mr. Wilner, then it is your duty to come in and find him guilty. That is our sytem.

However, if you find that there is a reasonable doubt, one that would make you hesitate to act in a matter of importance, then you've got to have the guts, if I may use that word, to come in here and send him home. It is as simple as that. We want nothing more than that and nothing less.

This indictment is a form of pleading. It contains two charges against Mr. Wilner. You know by now that one is

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what we call a general conspiracy count and the second charges him with possession of the marijuana in May of 1973 at the Rye Hilton Hotel.

This indictment is nothing but a piece of paper at this time. It is to inform him of the charges against him.

When he came in here and pleaded not guilty, it created an issue of fact which you must decide. It is as simple as that. It is not in evidence. It has no validity other than what it is, a charge. In the civil law we call it a summons and complaint; nothing more than that.

Now, you know as he sits there he is presumed to be innocent, right now, even after the government completes its summation. You know that the burden of proof in this case beyond areasonable doubt rests with the government. And it is not a personality contest, it is not me against Mr. Truebner or Mr. Pykett, that's not it.

You know, when Robert Kennedy was the Attorney General of the United States, behind his desk was a placque and that placque read that the government never wins or loses a criminal case because the verdict is justice itself, and I am paraphrasing it. And that's true. There is no winner here or loser as far as the government is concerned.

So we look to reasonable doubt. Is there a

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reasonable doubt in this case? Is there enough evidence here that would convince you to find beyond a reasonable doubt that Robert Wilner violated this law?

Now, the very first witness that testified in this case, you might recall, was Richard Thurlow. You will remember that Richard Thurlow testified that in a boat off Williams Cay he was arrested by Bahamian officers in conjunction with American Customs agents, taken in a boat to Nassau, charged with possession of marijuana, put into a prison that is called the Old Fox Prison in Nassau and brought to trial.

Now, there is a province in our law that says because we must respect the oath here more than anything else in a courtroom that where a witness voluntarily lies as to a material fact, does it on purpose, you may disregard his entire testimony if you so choose to do so.

Now, there is more to it than that. And Judge Lasker will tell you. But we are so concerned in our system that a man can come into a courtroom and perjure himself to convict another man that we give you that option, you, the jurors. Nobody can tell you when to do it or how to do it. But if you find that these three men voluntarily lied, or willingly lied under oath, you may disregard their testimony if you so choose. And I am going to prove to you that each

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and every one of these three witnesses not only perjured themselves here, but did so in other places.

Let's start with Richard Thurlow. He tells us that he walked into this court in Nassau and he told a story, made up the story completely. As a matter of fact, he told us here that he couldn't remember what he said even, he had told so many lies to that Bahamian court under oath and a similar oath. More than that, Mr. Robinson, Sargeant Robinson, came into this court and testified as to what occurred. He not only told a story, but he stood up and said that Sargeant Robinson was a liar in his own land in Nassau under oath.

Listen to what this man said. He told that court how he saw the men coming toward him, meaning the agents.

"I suspected they were the men who owned the pile," he said, meaning the marijuana. "They were not in uniforms. They did not show us any identification of any kind, except for the guns that they pointed in our eyes."

You heard what Sargeant Robinson said.

" The men that approached us said they were four agents. Sargeant Robinson was not one of them. I did not speak with Sargeant Robinson at the time. I did not say what Sargeant Robinson said I told him. I did not tell

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him I was sent for the stuff. The men handcuffed us, they drank water, they ate our food, they made us lift the bags with handcuffs on into the boat and drove us off."

That is what he testified to. But he told us here that the very next day he woke up in prison and said to himself -- you will recall very clearly -- he felt sorrow at the fact that he perjured himself in that Bahamian court, he wished it hadn't happened. He told us that if he could have turned the clock back, or words to that effect, it would never happen again.

So what does this man do? He waits 30 days, until he is sentenced, then he sits down and writes the magistrate, the judge, a letter, swearing to the judge that everything he testified to, which he now admits is perjury, was true.

That is Richard Thurlow. That is Richard Thurlow.

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Let me sum up Richard Thurlow, because even Mr. Truebner at this point was shocked, and I'll show you what I mean. These are questions that were asked him right here, Mr. Thurlow.

THE COURT: By whom? Whose questions?

MR. LA ROSSA: It is cross-examination, your Honor. I think it might be me. I'm not sure.

"Q So there is no question about it, is there, Mr. Thurlow, youwould like to save yourself?

"A That I what?

"Q That you would like to save yourself?

"A Yes, sir.

"Truebner: May we have the last question and answer read back? I wasn't sure whether he said would or did lie to save himself."

The record is there. Would. Not did, back in the Bahamas; would.

Was he ever prosecuted for that perjury? Will he ever be prosecuted? Or he is tied in so well on this deal that he hasn't got a thing to be concerned about? Remember, he is not even a defendant in this case.

Now, in July, 1973, he is in Old Fox Prison and he tells us that the toilet facilities are horrible, he is not getting enough good, it is an old, decrepit

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prison, and he wants out. So he sits down and talks to a couple of the agents.

Why? Here he tells us why he wants out. I'm sorry; I'm using the word "out." Why does he talk to the agents? Because he wants out of Old Fox Prison? No, that's not what he tells us here. He wanted to talk to the agents for the following reasons, he tells us under oath: because he wants to be a good man, because he wanted to bare his soul, because he wanted to be a good citizen, and no other reason. Okay?

January, 1974, just a few months ago, in a courtroom similar to this, a United States District Court in Boston, Massachusetts, he takes the stand under oath, right? And here's what he does. See, it is right here. We can't make these things up. It is right in the record, and this is what you have to decide it on.

Well, I can't find it, but I'll tell you what he said. He said, in that Boston court, "I wouldn't talk to those agents until I got a couple of promises." And he tells us what promises. Wouldn't even talk to them first. Here he would like you to believe: good man, bare his soul, and a good citizen.

Was there perjury here or perjury in Boston? Which?

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In December, 1972, he tells agents, upon being interviewed at Fox Hill Prison, and admits here --

THE COURT: Did you say December, '72?

MR. LA ROSSA: Yes, sir.

I am not saying that he told the agents this. I am saying he told the agents that in December of 1972 he hjd $75,000. He also told them that after a trip that he made in August, 1971, he never made another trip where the minimum was under $50,000. He tells us that he made six trips. He tells us of one in which he has 75, he tells us one in which Stretch Gregory got $44,000 in cash plus $5,000 in marijuana, he tells us about another one where he brings two tons in -- by the way, none of these have anything to do with anyone sitting here -- brings in two tons of marijuana, takes off 500 pounds himself.

Now, you heard yesterday that 500 pounds is worth 150 a pound. That is another 75,000. Okay?

So, when they get him out of prison, Mr. DeMico sets him up with one of the other agents, who fills out his tax return for him. And, as he tells us, "The agent told me that he was formerly with the Internal Revenue Service." And he files the tax return for that year, and - you can add it up - where it would be hundreds of thousands of dollars, the total income is $25,000. This

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is after he's informed the U.S. Attorney and everyone associated with the government of each and every trip and how much money he made. Okay? $25,000, he puts down on that return, total tax is 5,000.

Has he paid it? No. Have they asked him for it? No. Have they asked him where he kept the money, where it is? Is it in a vault? Nobody bothered. Youtry that. You try that. You'll have to worry about paying someone like me to represent you.

So we bring up that tax return here, right here on cross-examination, in this courtroom, under oath. We are talking about the tax return that he filed with the agent's help:

"Q Let me ask you this: when you filled out that tax return and put down '$25,000,' were you concerned about that statement?

"A I still am.

"Q You are still concerned that you might be indicted?

"A Yes, sir."

That's not true, though. Just listen to this. In Boston, under oath, the following questions are asked:

"Q Do you remember stating in connection with what other promises were made to you that there would be no legal

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action taken against you by Internal Revenue Service?

"A Yes, sir.

"Q Did you say that?

"A Yes, sir.

"Q When you said that, you mean no criminal legal action?

"A No criminal legal action taken against me by the Internal Revenue Service and that they would pay my expenses to come to trial.

"Q Did you give that answer to that question?

"A Yes, sir."

Now, is he telling the truth in Boston and here? Can you live with that? You know, you can ignore all this. You can just ignore it. And I'm nowhere near finished. Just with Mr. Thurlow.

b2

As I said, we can't go in with you.

Coast Guard license. A third mate, he tells us, is a man who is equipped to run a small boat. Now, what does the man stand accused of right now? Nothing. But what does the United States Government know about him? They know that on six separate occasions he engineered boats into Jamaica and smuggled marijuana into the United States. That's one.

Two. They know that he, in conjunction with other

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men, nobody here, mafia people whom we'll talk about later, went to Jamaica and sat down with a man called Big Jack -- remember that name because you'll hear it from me more than once -- and they discussed marijuana to Florida in return for boxes of grenades and machine guns.

And you want to know something interesting? That man got off the stand with his third mate's license in his pocket. Nobody has taken an action against him. That is a stamp of approval. That's like taking an alcoholic who can't handle himself and buying him a sports car.

He tells us about a trip in 1971 aboard a yacht, here he pulls into Jamaica, he tells us, and a boat pulls up alongside at night, marijuana is loaded onto the boat, and they leave. Did he ever speak to anyone in Jamaica? No. Did he ever see anyone in Jamaica? No. Did he have anything to do with the Jamaicans or the purchase or the marijuana? No. Okay?

Now he talks to the agents. That's what he swore to here, by the way. But he tells the agents about that trip. Marijuana was obtained from Big Jack -- you'll hear his name half a dozen times -- in Jamaica on that trip. How does he know it is Big Jack? "Because," he said, "I remember it clearly. Big Jack's daughter was bitten by a spider" - remember that? - "and she had to

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be rushed to the hospital, and therefore we were held up. So, when I went back the next time to buy another load, I knew who Big Jack was."

But he swore to you here, ladies and gentlemen, that he never met any Jamaican on that trip. Just a little inconsistency? Or an outright lie? You are going to have to decide that.

Bob Higgins, Peter Hoyer. You probably don't even remember their names. They are two friends of his that he imported into Florida for the purpose of marijuana distribution. He tells us that Mr. Higgins drove cars for him, that Peter Hoyer made trips for him, that the three of them were involved in various distributions of marijuana.

No indictments, no charges, two of his close friends. These trips that he was talking about were in the beginning of 1973 and the end of 1972. Somebody playing God here? Is somebody saying we'll indict him and not him? Part of his testimony is believable and part is incredible?

Then he tells us about Mr. Mitchell. Thurlow I'm talking about. He says Mitchell came to him and said he wanted some assistance in rushing some money from a bank robbery. Do you remember that? Thurlow said, "Absolutely not." And why, on page 282, did he say that? "Because that's violent," he said. "I don't have anything to do with

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violence."

Mr. Thurlow would not do anything violent or have anything to do with violence. However, he has a friendship and an association and a criminal participation with a gentleman by the name of Bill Rose. Now, who is Bill Rose? See if you can remember all this. There is a lot of it. He tells us Bill Rose is a hit man for the matia, big man in the mafia, runs all the marijuana into Miami, runs all the cocaine in from Colombia, South America, supplies Fidel Castro with guns, has CIA agents working for him, and any time you want to get out out of the country, he tells us, Bill Rose will fix you up with a little identification in two seconds flat for a few thousand dollars; he can do it all, he's got a complete criminal syndicate.

Bill Rose introduces Mr. Mitchell, this fine, outstanding young man who isn't even charged in this case, to Bill Johnson and Brad Wills, and these four gentlemen, after Mr. Mitchell puts 25,000 into the syndicate, fly off to Jamaica and sit down with Big Jack, where they try to trade off machine guns and grenades by the boxful for marijuana, and he tells you in this court he'll have nothing to do with violence.

What did he think the machine guns and the grenades were for? Souvenirs? You can accept it or you can ignore

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every one of these lies. We can't go in there with you.

By the way, that was 1972, the trip to Jamaica. We are now in 1974. He has never been asked to testify before a grand jury about Bill Rose, Johnson or Wills. He has never been indicted for any of these acts, nor have the mafia hit men that he told us about.

THE COURT: Do you mean Thurlow? You said Mitchell.

MR. LA ROSA: Did I? Thank you very much. Everything I said up to now has been Thurlow.

THE COURT: I thought you meant that.

MR. LA ROSA: None of these mafia people have been indicted for any of the serious crimes we're talking about.

Tommy Swann, [illegible] friend of his. Remember him? A lot of these names you probably have forgotten about. He and Tommy [illegible] ton of marijuana. He got 500 pounds. [illegible], nor was Tommy Swann indicted, nor did he [illegible] testify against Tommy Swann in

b3 a grand jury or anywhere else.

I am not that good at picking out perjury, but I bet, if I spent another day with you, you'd have a few more.

But forget that. Forget what he said here compared to Boston, what he said here compared to what he told the

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agents what about the man? What about the man who sat here? Isn't he such a morally decrepit man that you can't believe him, based upon he himself, forgetting about what he said? Can you say that his testimony doesn't raise any doubts for you, wouldn't cause you to hesitate in a matter of importance involving your family, one of your children, your husband?

Do you remember he told us that he was rushed to a hospital in Maine, didn't know what it was all about, wouldn't admit that it was involving drugs, then he thought it might have something to do with drugs? Remember, this man has taken every kind of drug I ever heard of and some I haven't heard of. There were some initials like LSD, THC, mescaline,this-caline, and that-caline and cocaine and everything else.

We are not here to bury him. That is not my purpose. We can't hurt him. Remember that. The day he walked out of here, he left. He is not being tried next week for this case. He is not a defendant in this case. He is a co-conspirator, not a defendant. Somebody chose to do that.

But listen to this. I've got to read this to you too because this is the first witness that you are going to determine whether or not you can believe in determining Robert Wilner's innocence or guilt.

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This man was taken to Jackson Memorial Hospital, which you might recall, Florida, because he was into a police station in Fort Lauderdale, said his employer was chasing him down the street because he wanted him to marry his daughter, and someone was breaking into house with a gun. By the way, that is sad. I am not suggesting that this is funny, because it must have been instability at its greatest. And they brought this man in and he was violent and he broke screens and he wouldn't talk to them. And that is what I read into the record during the trial about his medical report:

"Acutely disturbed man, four days, brought in by relatives, out of touch with reality, delusional hallucinations. In the past few months the patient was approached by some men who wished him to smuggle heroin, but he felt very strongly that heroin was wrong. Yet he feared that if he did not comply with these demands these men would kill him.

"In the days prior to admission here the patient reported three men burst into his apartment with a gun to discuss the smuggling of heroin with him. The patient ran from the room, found a friend who was going to Fort Lauderdale, drove to that city with him. In Fort Lauderdale he felt he was still being followed by the same men, so he turned

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himself in to a police station. The police thought he was intoxicated and locked him up for drunkenness.

"The following day the girlfriend and his employer picked him up." I am going to skip down a little bit. "In our emergency room, the patient was quite delusional, stating his boss had been trying to force him to marry the boss' daughter. When asked about drugs" -- listen to this -- "his response was that while in Maine the patient belonged to several groups for the help of drug addicts. He presently felt very strongly against the use of drugs."

Do you know when this was? This was in between two trips he made to Jamaica.

"He poked his finger into screen holes, he is hostile, threatening, he feels that he had a bad trip on LSD, he told one of the doctors."

And the final diagnosis: "Acute paranoid schizophrenic."

No doubt? That wouldn't make you hesitate in a matter of importance to you or your family, along with all the rest of it?

You know, interestingly enough, Agent Wall took the stand and he proved Mr. Thurlow committed two other very important lies, and I'll tell you why. Agent Wall interviewed Mr. Thurlow, and when he interviewed him Mr.

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Thurlow told Agent Wall that he and Robert Wilner together went to Jamaica, Robert Wilner purchased marijuana, 600 pounds, and Robert Wilner paid the man $5,000.

Do you know what he said here? He swore to you here under oath that he never saw Robert Wilner in Jamaica, he was never there with him and he can't even tell you if he was ever there. Now, why did he make up that story to an agent in the middle of 1973? Was he trying to sell something?

Item number 2. He tells Agent Wall that he was hired by the corporation, Air Seas Charter, and they made the following deal with him: Each and every month they would write out a check for $1,300 and give it to him. He would take the check, endorse it, cash it and give Robert Wilner the $1,300. Okay?

This is what he told Mr. Wall. But, see, he thought about this after a while and he realized that a check that is made out to someone else and clears through a bank, there is a way to get that copy. So now he can't say that, can he? So he tells you under oath that he never received the check for $1,300, never cashed the check for $1,300, and never gave him the $1,300. Just a mistake? Just mistakes? Do you take a man's life away based upon this kind of testimony?

b4 I am going to break it up a little bit. The

indictment in the first count charges a conspiracy beginning on the 1st day of August, 1971, and running to December, 1973. The dates are important. I submit to you that one of the charges you are going to be given here is that you must determine whether there is one conspiracy here or more than one conspiracy. If you determine that there is more than one conspiracy within the time period from the 1st day of August, 1971, until December, 1973, you must acquit the defendants on count 1.

Now, I submit to you that you have heard evidence in this court that had nothing to do with Robert Wilner and a lot of other people sitting here introduced as part of the government's case. I am going to get very technical with you and I am going to ask you to think about this. I submit to you that the government's proof shows a half dozen different distinct conspiracies, if believed.

Remember, in August, 1971, the trip down to Jamaica, no one even knew Robert Wilner then, according to the testimony. More than one conspiracy within this first count and you must acquit each and every defendant of that count.

Gerald Mitchell, the second witness. Mr. Mitchell had a terrible affliction in that he stuttered, as you all remember, and the examinations were probably were tiresome to you because questions had to be repeated and answers had

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to be repeated, and it was very difficult for him in front of all these people to have to stutter like that, I'm sure.

However, in return for all that, and for all he did in this case, he wasn't charged as a defendant in this case either. So I don't really think he is terribly upset over the week that he spent in this courtroom.

But what of Gerald Mitchell? Because he is the second major witness. You will recall that Mr. Mitchell was driving down the Jersey Turnpike and a young state trooper, whom we met, pulls him over, smells marijuana, arrests him, and brings him to Salem County, which sounds like it should be a western song.

They hold him in no bail the first night. Thereafter he is held in $35,000 bail, and suddenly he writes a letter to the District Attorney, he tells us. Where is the letter? He doesn't know. What did he say in the letter? I don't remember. What was the content of the letter? I have no idea.

But after sending that letter, Detective Coyle comes to the Salem County jail, you might recall, and interviews him. The following day he brings Agent Bankhead and Agent DeMico and they interview him, and then suddenly, mysteriously, within the next 24 hours, he pleads guilty to a charge, the bail is reduced from $35,000 to $1,000, and somehow his mother and dad sent the thousand dollars up, and there it was.

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Why did they send it up? Well, it didn't have anything to do with the bail, he said as an afterthought; it was just fortuitous that that money came up. It was intended for the lawyer that he had in New Jersey, but it just worked out well.

Why did he do it? To get out? Absolutely not. It was the last thing that he ever intended to do, as you might recall, get out of the Salem County jail.

But they get him out of the Salem County jail. Well, what did he do? He goes up to the Rye Hilton, and this you didn't hear about in the government's case on the direct testimony. Think about why they left this out, as I'm telling you, please.

October 12th he goes up to the Rye Hilton, rents a room, calls Mr. Wilner, calls Mr. Mecca, and when they come to the room, "Maybe I threatened them, maybe I was very, very ugly, I don't recall whether or not the agents told me to threaten them, there was no recording in the room," he says at page 776, he never gave anyone any authorization to put a recording in the room.

That's what we got for 20 minutes on the stand. He didn't remember what he told Mr. Wilner, he didn't remember what Mr. Wilner told you. You remember, we went through an afternoon one day with this young man where he wouldn't

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remember a thing. But we showed him a paper that he signed that authorized the agents to place a bug in the room, and he signed it under one of his fictitious names. Why he uses three or four fictitious names, I don't know. He didn't explain that to us.

Now he remembers, after about an hour of this, that they put a bug in an air vent in the room. Not a word of this now on direct. And he said Mr. DeMico was there. Where is the recording? Where is the recording from that bug? What was the matter with it? Did it work or didn't it work? Why didn't Mr. DeMico take the stand and tell you that it didn't work or tell you it did work? Why haven't we seen it? What did Mr. Mitchell say in that room that they couldn't let you hear? Why did he lie about the bug and the authorization?

"I have fabricated stories in the past on many ocasions." I'm quoting Gerald Mitchell, page 786. "I have fabricated stories in the past on many occasions." He is the kind of man that they want you to rely upon. For pages, he told us that he did not recall ever asking Thurlow to dispose of any bank robbery money, never did anything like that. However, pages later he remembered that he borrowed a thousand dollars from a Frank.

Frank who? He didn't remember his last name. And

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he offered this thousand dollars to Thurlow. Why? Because he owed him a thousand dollars. And Thurlow refused it. Why? He doesn't remember. He might have made up a story about it, but he doesn't recall.

Do you really believe that? Are you going to buy that or do you buy what Thurlow said about him? Remember what Thurlowsaid about him? His girlfriend got knocked up and he pulled a bank robbery. I'm using those words because b5 that's what the record says.

I don't blame him for not admitting that here. That is a very serious crime, a bank robbery. But he choose to take the stand. And if you think he lied, then treat it as such. You are going to have to determine when he is telling the truth and when he is not. That is a frightening thing for you to do.

"I rode the stolen car once," he said. "I turned it over, but I wouldn't do it if I knew the car was stolen, because that is illegal, against the law," he said.

In Salem County he took a plea where the maximum sentence was eight years. He got probation, never went back into Salem County, never asked anybody what he was going to get, never spoke to his lawyer about it, didn't really care. He said, on page 800, "It really didn't make any difference if I got any more time."

Let me tell you something. If that's true, if what he says is true, it really didn't make any difference that he got more time, then you shouldn't accept his testimony, based upon insanity, because I've never met the man who wanted to walk into a jailhouse and have the doors closed on him. It didn't make any difference, he said, wasn't doing it to help himself, never asked anybody, never spoke to Mr. DeMico about it, didn't ask his lawyer, didn't hear the judge say anything about it -- not this judge, I mean the judge in Salem County -- didn't hear the prosecutor say anything about it, just fortuitous, he said, lucky.

October 9, 1973, one week after the Rye Hilton, he comes into this building, goes before a grand jury, testifies to facts which suggest that he's been involved in a lot of criminal activity, and he says, "I thought I was going to be indicted. I didn't know that I wasn't going to be indicted." Never asked, never cared.

He admitted rehearsals by government witnesses, he admitted a dry run in this courtroom, where they brought him in and sat him down and showed him the way it works. And they put him, Palmer and Thurlow together for the weeks that we've been on trial, and they had dinner together and they sat in rooms together, and he, Mitchell and Thurlow on many nights had dinner together, but they never

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once discussed any facet of this case, ladies and gentlemen, they never once discussed anybody in this case, ladies and gentlemen, they made sure that for the nights and the days that they were together they never once mentioned anything about this case.

Buy it. Buy it. Chew on it. See if you can live with it. See if you can take his freedom away with that kind of answer.

Do you remember the signing of Mr. Wilner's name on the document? He didn't sign that, he said. And I made him write his name out. And again, four or five pages later, he said, "That's my signature. That's mine. I put Robert Wilner's name on there. But he gave me permission. I wouldn't forge it or anything."

Look at this. Who wrote this? Did he write this one? You can't even read it. Somebody rubbed it out. You can just see a little bit of the "Wilner" on this rental car agreement. Did he write that? Did Wilner write it? Did Mitchell sign it? Did Palmer sign it? Take a guess. You can take a wheel of fortune in there, spin it around, and it it hits the right number then you can put it in category A, because that's basically what you have here. It is like one of these quiz programs some of the ladies watch during the day, where they spin the wheel, and it it gets to the right

number you win. That's basically what you have to do with these witnesses, and nothing more.

We spent a day of evasiveness with Mr. Mitchell like you couldn't believe. He told us that he met Stretch Gray on one occasion. Remember Stretch Gray? That he met the man at Thurlow's house when he and Stretch Gray were house guests. -- that's not an important point, it's another lie -- and he never once mentioned marijuana or any drugs to Stretch Gray.

Months later, after he was arrested, he tells the agents that he can give Agent Bankhead information on Stretch Gray being involved, and he tells him about how they discussed marijuana. Which one? Which one? Spin the wheel. Fictitious names, many fictitious names. Robert Wilner used one, Robert Wilner. Mescaline, LSD, Dextadrine, other drugs. Remembers events in 1973, he says, clearly, but he can't remember what happened three weeks ago too well, he tells us.

But in 1973, after this indictment was returned, after each of these young men were brought into this building andpleaded not guilty, after their families went down and retained lawyers, Gerald Mitchell showed his true colors. And you remember the hours of testimony on this, where he wouldn't admit that he called Mecca, he wouldn't admit that

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he said this and he wouldn't admit that he said that. But you heard it. You heard every word of it. You heard it right here, sitting right up here. You heard this man's voice, and because of his affliction there is no way that that could be somebody else. You heard what he said. He called Mr. Mecca, and the first words out of his mouth were, "We have to get together to talk, huh?" says Mecca. "We have to get together."

Who is this? Jerry Mitchell. "We have to do something," he says. We have to get together and talk about that. I think we should get together and negotiate something." This is a man who wants you to believe that he is being b6 bribed. This is hard extortion, nothing but.

"Whatever you want. I don't know what the deal is. Then we better get together," said Mr. Mitchell. "It's up to you," says Mr. Mitchell. "We are gonna get together," said Mitchell. "Let me give you a call." This is the end of the first call.

"Mecca: All right. When will I hear from you?" "Later this evening," says Mr. Mitchell." Then he hangs up.

Now the second phone call comes. He must have smelled a rate, so he refuses to get on the phone again and he makes Bob Vissa get on the phone and act as an intermediary, pass the questions back and forth, and he

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makes his demands, and it took hours to get him to admit it, but the purpose of the call, and it is right here in the transcript, I don't want to read page after page to you, was to get money, and he wanted $8,000, and it better be in Boston by tomorrow morning, he said.

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Then the phrase is used, "Or a lot of innocent people, a lot of innocent people --" I want to get the exact words.

"He says he's going to, if he doesn't get the money, he's going to hang everybody, he's going to hang innocent people." $8,000, hard-core extortion.

After he got out of this case, after agreeing to be a government witness, he extorted $8,000. And you want to know something, he has never been charged with that serious crime. How do you like that?

Now you want to hear the ultimate perjury right here three different times, this man in this courtroom, not in Boston, not anywhere else, right in front of you?

Did he hear Vissa say the words "hang innocent people?" That's what the question was.

Early in cross he said, "Yes, I heard him, but what was I supposed to do, stop him?"

Later, the following day, or the day after that, Mr. Lanna is examining him:

"I think you already told us on Tuesday or Wednesday when Mr. La Rossa was examining you," this is the question, "that you heard Mr. Vissa say that if he doesn't get the money, or words to that effect, he is going to hang innocent people, isn't that true?

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"A No, sir.

"Q You didn't hear that?

"A I don't believe so, sir.

"Q You didn't tell us the other day that you had heard that?

"A I don't remember. I don't know. Maybe he said that. I am not sure. Maybe.

"Q Do you recall being asked this question by Mr. La Rossa and giving this answer or these questions and answers:

'Q Don't remember that? Do you remember Mr. Vissa saying to Mr. Mecca in this phone that you said that if you don't get the money he is going to hang everybody and hang innocent people as well?

'A I didn't say that, sir.

'Q I didn't ask you that. I asked you if you heard Mr. Vissa say that on the phone.

'A Yes, I did.'"

Now, after Mr. Lanna reads those questions to him he says, "Do you recall being asked these questions and giving these answers?"

And this is Mr. Mitchell's answer:

"I recall the question, I don't recall the answer.

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"Q You don't recall giving that answer? That was on May 15th.

"A Yes, sir."

Now later on on the following page, "Do you now, on May 17th, remember Mr. Vissa saying in your presence that if he doesn't get the money you are going to hang innocent people?

"A Yes, sir."

Which one do you want? You can have three yeses and two nos. Within 15 pages you've got three yeses, two nos, and if you go back another hundred pages you've got a yes and a no.

No reasonable doubt yet?

Now, ladies and gentlemen, you know that Mr. Wilner and the other defendants need prove nothing in this case. You will be charged that they have no duty to do anything. I could waive this summation. You probably wished I did. I can waive an opening. I don't have to examine a witness. Mr. Wilner and the other defendants have no responsibility in this court whatsoever.

Now, I chose that he not testify in this case and he didn't. And I did so based upon the government's case.

Now, Judge Lasker is going to tell you that he has every rifht to do what he did. It is our system and you

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may not infer anything wrong from it. In fact, you ought to thank us. We would have had you here for another week. Now, that's the law.

I believe there are two things that the government is going to talk about in their summation and I don't get a chance to answer it so I want to answer them quickly.

You might say, how do I know what they are going to say? I'm not a mystic, but a few cliches have developed over the years and we hear them very often in these kind of cases and I suggest you are going to hear them today.

One of them is, "I don't want you to take home Mr. Mitchell, Mr. Thurlow and Mr. Palmer, I wouldn't take them home, either. We are not saying that they are nice people. However, who else could we bring to testify against these people? We can't bring clergymen, we can't bring businessmen. We have to bring the kind of people that associated with them."

That is going to be the first argument. All right?

Stop and think about that for a minute. I don't care what they are, you still look at what they were, who they are and how they testified here, that's what's important.

And the second thing they are going to tell you

is that this proves everything that every witness said, that these corroborate each and every fact that occurred in this case. And I say to you, don't buy it, don't buy it. Because when Thurlow and Mitchell were arrested, you remember some of the testimony that was here, in one instance they told someone they hadn't met the other people until April and in another case later than that.

This case was woven around a legitimate business. There is no question about the fact that there is a corporation called Air Seas Charter. Interesting that you didn't get any papers since they are filed. Interesting that nobody bothered to prove to you who really owned the plane and who really owned the boats and how much financing was on the boats and how legitimate a business it was and whether there were contracts to do deep sea fishing on these boats and whether the scoundrels that worked for this corporation used the transportation available to them, brought in marijuana and to save themselves, brought in people that nobody puts in any of these places. Remember that. There is no one who could say that Mr. Wilner had marijuana in his hand, except one of them. Remember, they had tracking devices in planes, they had surveillance agents. Not one time does an agent come into this court, not one agent and say, "It's true what they say, I saw A and B together."

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Do you think that would have taken such time? Mr. De Micco could have just skipped over to the witness stand and told us in two minutes so we could have had one witness on the stand that wasn't so tarnished, that maybe you could believe.

I am going to tell you why Mr. De Micco didn't take the stand. That comes.

So the exhibits don't corroborate anything. They prove that Mr. Wilner was in Florida and in certain of these places, but not that he was involved with Thurlow and Mitchell and Palmer; no. Don't buy that argument.

Mr. Palmer -- I am almost finished -- Mr. Palmer is a throwback to the old bush pilot, I guess, Smiling Jack, in the publishing business. Interesting man, you know, bouncing his Piper Apache off the hard pan of Williams Island to see if it was hard enough and whirling up into the air again. Interesting man. A pilot teacher who, from January 1972, begins to teach Robert Wilner how to fly.

In 1972 and all through the year in the many hours that two people are up in a plane together at an hour at a time, nobody to interrupt you, no telephones, nobody to talk to you, just you and the instructor, all of those hours, including visits to Mr. Wilner's home, including luncheon appointments, the word marijuana is never heard.

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Not once.

Then Mr. De Micco meets Mr. Palmer and says, "How would you like to be on our side," or words to that effect. "How would you like to join the team?"

Since he has been an adventursome kind of guy he thinks it is a nice idea. In addition to that, there is probably a reward or a promise of a reward or maybe a hint of a reward or as Mr. Palmer calls it, reimbursement for expenses and time. Okay? Still Mr. Palmer says no. Okay?

So Mr. De Micco takes Mr. Palmer to his boss and his boss and his boss hears the story. Now, what does his boss do? His boss owns a flying school that is teaching Mr. Wilner how to fly and obtaining money from him, so when the boss hears the story he says, "Mr. Palmer, you should do it, get involved, get rid of one of these pupils, we are making too much money anyway." So he almost insists that Palmer does it and Palmer does.

Within one day, ladies and gentlemen, after over a year of being together with this man, within one day he tells you that in a 45 minute conversation not only do they mention marijuana -- they haven't even talked about it for a year -- but they talk about smuggling it, they go into the operation, they talk about how much money he can get, they talk about 60,000, 10,000, 5,000. And here is what he

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remembers. He doesn't remember who said it, he doesn't remember who at the table said anything about marijuana or about money, he can't point his finger to anybody, he remembers this phrase, "smuggling marijuana into the United States has a high money potential."

How is that? That is right out of the Wall Street Journal, isn't it?

So he finds out that he can't get a reward in marijuana, he naturally backs off the team. Up to that point he was trying to be a good citizen.

Now, I am going to tell you why Mr. Palmer lied to you and I'm going to prove it to you.

Mr. Palmer told us that after March he met Mr. De Micco each and every month once a month at least from March until December. Do you remember? And what did they talk about? They had casual talks. De Micco asked him about Wilner, do you see him any more? He said no. That's all. Except for one thing. Mr. De Micco, in July, finds out from Mr. Thurlow that Palmer flew the plane on the May -- I am sorry, not from Mr. Thurlow, he finds out in September from Mr. Mitchell that Mr. Palmer flew the plane.

Now, does that upset Mr. De Micco to know that his old informer is now flying marijuana all over the world? Not at all, according to Mr. Palmer, because he continues his

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monthly visits. And Palmer takes a load in August and September all by himself.

You see, he really didn't need any help. He didn't need this team out in the water and boats or anything, he had a plane. He could fly right to Connecticut.

Now, do you believe that Mr. De Micco doesn't say a word to Mr. Palmer about that? Do you think Mr. De Micco stamped his license to bring that load in in August and in November after finding out in September that Palmer was in on it, according to Mitchell? How do you buy that?

Here is Palmer's testimony. Palmer brought in 700 pounds, he paid $10,000 for it. This is the greatest profit margin I have ever heard of in anything. He paid $10,000 in Jamaica for it, somebody paid for the gas, he flew the stuff to Connecticut and he got $150 a pound, which in rough numbers comes out to $105,000 and the U. S. Customs Department -- and this is in evidence -- serves a notice of penalty on him, fining him $500 for coming into the United States and not clearing Customs. Okay? That is a bit of a drop in the bucket when you just grabbed 105 thou.

Never has anyone asked him to pay the 500, he hasn't offered to pay the 500 and nobody at this table has suggested to him to pay the 500. After all, he is part of the

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team now.

Then we started to get into the money he made and where it is. Was it in a vault? And that's when the trouble started. Do you remember that? He said, I refuse to answer, I take the Fifth."

"Did you put the money in your tax return?

"I refuse to answer, I take the Fifth."

We all knew he meant he refused to answer on the grounds that his answer might tend to incriminate him under the Fifth Amendment of the Constitution and he has the right to do that. So everybody sitting in this courtroom must have said to themselves, the man is trying to protect himself against an eventual indictment for taxes. Okay?

So we get to a lunch break. Everybody goes out to eat lunch, but apparently Mr. Palmer didn't, because Mr. Palmer comes back into court and through his attorney announces to Judge Lasker that he now wants to answer the questions. One hour later the fears were wiped from Mr. Palmer about tax evasion and he was willing to take the stand and answer all the questions. Okay?

Do you remember that? Up until that point he told us what he wanted and that's what it is.

You also caught a little lie from Mr. Palmer right in front of you, ladies and gentlemen. I say a little

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lie. I don't know if there is such a thing as a little lie. He was caught. He never expected this.

This is cross-examination. He just came back.

"Mr. Palmer, you changed your mind from 12:30 until now on whether or not you should answer these questions, right?

"A Yes.

"What made you change your mind?"

Listen to this:

"Well, at present I have a chance to clear my conscience and tell everything, be honest, get it all off my chest at this time."

That's the publisher speaking.

"Is that the only reason?

"A Yes.

"Did you discuss with your counsel what the reasons were in changing your mind or did he give you any advice on why you should change your mind other than clearing your conscience?

"No.

"Didn't he tell you he didn't want your tax return before this jury? Didn't he tell you that?

"No.

"Did he tell you he did not want the government

to pull the tax return from the Internal Revenue Service?

"A No."

Okay? Very specific questions and answers.

Now we have a side-bar and Judge Lasker comes back and tells the following statement:

"Ladies and gentlemen of the jury, I wish to advise the jury that in the side-bar conference before the last one when I summoned counsel over there to discuss the questions that arose by Mr. La Rossa's questions, Mr. Silberkleit," who is the attorney for Mr. Palmer,"upon my questioning him as to what discussions he had with Mr. Palmer during the lunch hour, advised the Court that he had advised Mr. Palmer that it was not in Mr. Palmer's interests to have his 1973 tax return pulled, as the expression goes."

How is that? There is a lie right in front of you.

Now, the next question.

"Did you hear that, Mr. Palmer?

"A I did. May I say something?

"The Court: Yes.

"The Witness: When I talked to my attorney I did not go over the exact particulars, I didn't sit down and go over it thoroughly with him.

"Q That was about three-quarters of an hour ago, wasn't it?

"A Sure.

"Q That you had a conversation with him?

"A Yes.

"He's not lying when he makes that statement, is he?

"No, but I'm saying that I do not have a complete understanding with my attorney at this time."

Do you accept that? That doesn't raise a doubt?

There is one more thing we have to talk about and I am finished. I apologize, but since I am last, I had to sum up some of this stuff.

There is one other thing we heard, and we are not going to ignore it, and that's the tapes. You recall the tapes.

Now, tapes today are very much in the news. We all know they exist, we have all become aware of them, we know that deletions are possible, we know that additions are possible, we read about witnesses being subpoenaed to determine accuracy of tapes, how tapes were wiped out or erased.

What happened here? What happened to the tape of January 30, 1973 when our friend Mr. Palmer went to

Mr. Wilner's house? You remember that. That is the key to the tapes. I promise this is the last thing. You must all be awfully tired.

"Did you hear the tapes in this case," this is the question, "as they were being played to the jury?

"A Yes.

"You heard them before then?

"A Yes.

"Did you ever tamper with those tapes?

"A No.

"Did you ever speak into that tape after it was prepared?

"A No, I did not.

"Did you ever say to Mr. De Micco, 'why don't you run the tape and maybe I can fill in'?

"No, I did not."

He is then given a document to refresh his recollection from, one that he saw a day or two before.

"Does that refresh your recollection that you said, 'Why don't you run the tape and maybe I can fill in'?

"A Yes, it does.

"Do you see that?

"A I did. May I explain?"

Then he goes on to tell us that he was at the

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Purchase Country Club and it was not a successful recording, he said, and evidently there were portions that were not intelligible on the tape, "And I said, made the statement to Mr. De Micco that if he let me listen to the tape I could fill in with my own words, not on the tape but just to him, what I thought might have been missing from the tape but not on the tape, not to be transcribed on the tape --" I am reading this word for word -- "and if you can read further in the document you would see that they never did run the tape. It does say that. Mr. De Micco intended to run the tape, but he never did.

"Q Are you telling me when you sat down in that car or wherever you were with Mr. De Micco, Mr. De Micco told you the tape was unsuccessful?

"A Yes.

"Was every word that you and Mr. De Micco said to each other recorded?"

They had a recorder between the two of them. Apparently Palmer wasn't aware of that until after it happened.

"A I believe so.

"Is this a true transcript of that recording?

"A I would say so."

Then we come down, "Before you said fill in the

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tape or words to that effect, Mr. Palmer --" I am referring to the transcript now -- "that is on the first page of that statement so it had to be before that?"

I am asking him where it says the tape was unintelligible.

"A Then it is not on here.

"It is not on there?

"A Right.

"Is there a word on that transcript that says in words or substance about Mr. De Micco told you that the tape was unsuccessful? Yes or no?

"A In the entire transcript?

"Q That is correct.

"A Not directly, no."

The Court then says, "Mr. Palmer, find it. This is what we want to know. We are trying to find out what the facts are."

Mr. Pykett got up and stipulated, "I think we can stipulate that there is nothing contained in that transcript that refers to the tape."

Now, why didn't Agent De Micco get up on the stand? Isn't he the nexus here of all this? Couldn't he tell us if all of this was true or not? Why did he sit here in the courtroom or sit in the well of the court or outside

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the well of the court day after day and not get up and say yes or no? Is it because he wasn't willing to say something that wasn't true? Is it because if he took the stand we would have put the lie to all of this?

These two are bright young men. You know that if De Micco corroborates these three after the way they came off on cross, doesn't he put him on for five minutes and say, "What happened to the tape at the Rye Hilton? It wasn't successful. What happened to the tape on January 30th? It wasn't successful?"

Did you hear any of that? Did you hear an agent get up and say, "I placed a tape recorder or bugging device on Mr. Palmer's chest, activated it, put it on in such a way so Mr. Palmer couldn't remove it or shut it off, then immediately after the conversation was complete, I deactivated the tape recorder, took possession of it and Mr. Palmer never saw it"?

You don't know right now whether Palmer has had that tape for the last year, you don't know who has had it, you don't know if it is Bob Wilner's voice or anybody else's voice on there. You don't know because they wouldn't take the stand.

Now, this isn't me against Mr. De Micco, but what I am saying to you is that if they weren't willing to do that,

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you can't ruin his life, not on those three men.

Remember your oath, remember your conscience. If you follow your oath and you find that there is no reasonable doubt, find him guilty. But dear God, if you find there is a reasonable doubt, have the guts to come back in here and send him home. It's as simple as that.

I am sorry I was so long.

Thank you.

THE COURT: Thank you, Mr. La Rossa.

May I see Mr. Truebner and Mr. Pykett at the side-bar and any counsel who want to come up.

(Discussion off the record at the side-bar.)

(In open court.)

THE COURT: Ladies and gentlemen, there is one more summation to be made, of course, by the government, which will take perhaps an hour and a half, maybe not quite that long. I think the best thing for us to do, although it is early, is to go to lunch now and get back here early and listen to the summation of counsel and my charge. That won't take us any longer in total than it would otherwise and we will save the morning break that way.

We will adjourn at this moment, which is five minutes of twelve by the clock of the court, and return here at ten minutes past one.

(Luncheon recess.)

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THE COURT: Ladies and gentlemen, I hope I didn't overwhelm you by saying before that my charge is 40 pages long. Actually that is by no means a long charge, but it is long enough. In these days, when the law has become more complicated than it was in pioneer days, it is highly desirable for a judge to read his charge so that there is no doubt in his own mind about what he is going to say, so that he takes into consideration everything that the parties want him to bring to the attention of the jury, and so that the law is stated as clearly as possible.

I say all this only because I would prefer to sit and talk to you the way I am doing now. I think it is a more effective way of communicating. But I don't think that I will be able to do that. I also say it because, since I am going to read my charge, I may get going a little too fast. If I do, will you please raise your hand so that I will know and be able to slow down, because I want you to pay attention carefully to what I have to say in this charge.

The game has been played. You have to judge it now and you have to know what rules to apply to the situation in order to be able to do justice or render a true verdict as you swore that you would.

Now, ladies and gentlemen, before I commence my charge proper I want to remind you that as a result of my

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action, for reasons with which the jury is not concerned, the following facts are to be remembered:

First, I have stricken from the record, and you are not to be concerned with, any evidence relating to the events of August, 1971, or August, 1973.

Second, since I have excluded from your consideration the events of August, 1971, I have stricken from the indictment overt act number 1, which relates to those events. In my charge proper I will point out to you the significance of the overt acts in the indictment, and when we deliver the indictment to you we will, in order to be sure that you do not take overt act number 1 into consideration, blank it out.

Third, I want you to remember that the charges in count 2 no longer apply to Nicholas Calabra or Steven Smith.

Ladies and gentlemen, now that you've heard the testimony and the arguments of counsel, the time has come to instruct you as to the law governing the case. You've been chosen and sworn as jurors in this matter to try the issues presented by the allegations of the indictment, and on your determination of the facts, and I stress the words "your determination," to decide under the law as I shall instruct you whether the government has proven any of

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the charges of the indictment against the defendants or any of them beyond a reasonable doubt. I will discuss those charges with you in a moment in detail, but before that I want to give you a few important instructions.

First, that you are to perform your duties as jurors without bias or prejudice to or for anybody, whether the government or any of the defendants. The law does not permit jurors, and you wouldn't want it to permit jurors, to be governed either by sympathy or swayed by prejudice or public opinion. In that connection I want to point out that although this case involves marijuana, the subject matter of the case has nothing to do with your deliberations except that as one of the facts you must find as to the substantive count, count 2, that indeed what was possessed was marijuana, but you do not find the man any guiltier or any less guilty because of the nature of the charge. You only find him guilty if the government proves the elements of the offense which I will specify for you hereafter. So your personal attitudes on the subject about which I examined you at great length, it seems to me, when this jury was chosen, have nothing to do with the issues.

Second, we start with the proposition that we started with at the outset of this trial, that is, that the law presumes every defendant to be innocent of any charge

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against him. You will recall that when you were selected I specifically asked each one of you if you could enter into the discharge of your duties presuming each defendant to be innocent unless proven guilty beyond a reasonable doubt after your own deliberations, and each of you gave me the answer yes.

This presumption of innocence is sufficient to acquit any defendant unless and until you as jurors have unanimously satisfied yourselves beyond a reasonable doubt of that particular defendant's guilt on that particular charge from all of the evidence which has been presented. The burden, or responsibility, is on the government to prove, if it can, each defendant guilty beyond a reasonable doubt of every essential element of each crime charged, and I will of course advise you later in this charge just what elements there are to each crime.

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Third, I also want to remind you of what I mentioned at the outset of the trial, that is, that the existence of an indictment does not constitute evidence against any defendant but is merely a method of bringing a charge against him. The indictment in this case contains two counts, as you know. Each count contains a separate crime, which I will describe to you later, and they, the two crimes, must be considered separately.

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Equally if not more important is the observation that the indictment names seven defendants, actually eleven defendants, but seven are on trial. They are the persons whose guilt or innocence you must announce in your verdict. In the determination of innocence or guilt you must bear in mind that guilt is personal. The guilt or innocence of a defendant on trial trial before you must be determined separately with respect to him, solely on the evidence presented against him or the lack of evidence. The case of each defendant stands or falls upon the proof or lack of proof of the charge against that defendant and not against someone else.

Now, I have said, and the lawyers have said many, many times throughout the case, that the government has assumed the burden of proving each defendant guilty beyond a reasonable doubt. Let me define that important term for you at the outset.

A reasonable doubt is not a vague, speculative or imaginative doubt. It is a doubt which, as the phrase suggests, is based upon reason and which comes either from the evidence that has been put before you, that you've heard and seen, or from the lack of evidence, that you have not heard or seen. It is a doubt which a reasonable man or a woman might entertain. It is a doubt, and I think this is

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the best definition, which would cause reasonable men and prudent men and women like yourselves to hesitate to act in relation to matters of importance in your own private lives.

Let us say that you have an important decision to make. How do you go about making that decision? You think about everything you know about it. You think about everything that you would want to know and you haven't been told. And you say to yourself, "Do I have enough information? Do I have enough dependable information so that I'm ready to act?" If you say I don't, then you have a reasonable doubt. If you say I do, then you do not.

A mere suspicion would not justify a conviction. Suspicion is not a substitute for evidence. Nor is it sufficient to convict if you find that the circumstances merely render the guilt of an accused to be probable. The law does not deal in probabilities. Since the burden, or responsibility, is on the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, a defendant has the right to rely on the failure of the prosecution to establish such proof and the defendant may also, of course, as in this case, rely upon evidence brought out on cross-examination or government witnesses.

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Now, in saying that the government must prove its case beyond a reasonable doubt if there is to be a conviction, I do not mean to say that the government is required to prove guilt beyond all possible doubt. Indeed, in human affairs it is hard to think of anything that we can prove beyond all possible doubt with the possible exception of mathematical propositions. But the proof must be of such a convincing character that you would be willing to rely and act on in the most important decisions of your own affairs.

Now, the evidence in this case, as I've told you a number of times, consists of the testimony of the witnesses, the exhibits which have been received in evidence and facts which have been stipulated or agreed to by counsel. You have to decide the case based solely on the evidence. But in your consideration of the evidence you are not limited to the bald statements of the witnesses here or any witnesses in any trial. By using the word "bald" I don't mean to suggest anything about the character of the testimony, but I mean you are entitled to and must think behind the mere words that were uttered.

In deciding the many questions before you, it is your job to determine the credibility of the witnesses who have testified here. Now, how do you go about that? Perhaps the best answer is to say that you determine the

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truthfulness or accuracy or weight to be given to a witness' testimony in the same way that you would determine such questions in your own personal affairs.

We are all constantly called upon from day to day to determine how much confidence we place in the statements that people make to us. The truthfulness or dependability of a witness, as that of any other person, can be determined by his demeanor, that is, his look, his relationship to the case and to the parties, the possibility of his being biased or partial or of his not being biased or partial, the stake that he may have in the outcome of the case, the reasonableness or unreasonableness of his statements, the strength or weakness of his recollection, and the extent to which what he has said has been either corroborated or contradicted by testimony of other witnesses or by exhibits or stipulations.

Of course, the testimony of a witness may also be impeached by his own prior inconsistent statements unless there is some explanation for the inconsistency. In ordinary life, when you need to determine the truthfulness of a person, you ask yourself, don't you, as you would here, how did he impress me? Did his version appear straightforward and candid, or did he seem to be trying to hide some of the facts? Did he have any motive to testify falsely or no

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b4 motive of that kind?

The ultimate question for you to decide on in passing on the credibility of a witness is did he tell the truth before me. It is for jurors alone to determine the weight to be given to the testimony of a witness, and in making these suggestions which I have made I have given you guidelines only and have not attempted to dictate or suggest how you should apply those guidelines.

If you find that any witness has wilfully testified falsely as to any material, which means significant, matter, not some matter which you believe to be unimportant, you may reject the entire testimony of that witness or you may accept such portion of it as you believe and reject the remainder.

Now a few rules that apply particularly to this case. In judging the credibility of any witness, you mya consider whether his testimony was inspired by a motive or self-interest, personal advantage or hostility to a defendant so that he gave false or colored testimony against him, and whether the testimony of such a person was a fabrication induced by a belief or a hope or an expectation that he will receive favorable consideration, such as not being indicted or charged with the offense itself.

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As you know, the defendants contend that such motives are true of some of the witnesses here. The government has pointed out to you why they believe that that should not interfere with your accepting the truth of the witnesses' testimony.

In the prosecution of crime the government is often called upon to use witnesses who are accomplices in the commission of the crime itself. This is particularly so in cases of conspiracy. Conspirators do not publicly proclaim their intentions or operate openly. It often happens that only members of the conspiracy have evidence which is relevant to and important in the case.

However, experience has shown that accomplices may be motivated to place the blame on others than themselves. Accordingly, an accomplice's testimony should be carefully scrutinized and checked with the facts which you find to exist in this case and against the evidence which may corroborate it, and then you should give the testimony of the accomplice such value or weight as you deem proper under the circumstances.

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By the way, in the federal courts, accomplice testimony by itself may be sufficient to convict if it convinces you of the defendant's guilt beyond a reasonable doubt.

Now, it is, of course, proper for you to consider the interest which a witness has in the outcome of the case. I do not mean to suggest, however, that a witness who has an interest in the outcome of the case may not be telling the truth in spite of his interest, merely to point out to you that you may consider that factor in determining what weight to give his testimony.

A witness' testimony is, of course, not to be given any greater or any less weight simply because the witness is a government witness.

Now, ladies and gentlemen, as I have said, your determination in this case must be made upon the evidence. There are generally speaking two types of evidence or two definitions, at least, or categories of evidence from which you may properly find the facts in the case. I am sure you have heard them referred to often. One is called direct evidence. That is the evidence of an eyewitness or an earwitness. "I have heard it," such a witness would say, "I have seen it." The other is indirect or more generally called circumstantial evidence. Circumstantial

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evidence is defined as the proof of a chain of events or circumstances which itself points to the existence or non-existence of certain facts as to which there was no eye-witness.

The law makes no distinction as to the importance or weight of circumstantial or direct evidence just because it is either one or the other. It requires only that you, the jury, find the facts in accordance with all the evidence in the case, both direct andcircumstantial, beyond a reasonable doubt.

An example, by the way, of the difference between direct and circumstantial evidence is the following, an example which is given often to juries in this court but which is nevertheless, I think, a pretty vivid one and, therefore, I will use it, too.

If you looked out the window, not today, because it is nice but on a different day, and see it is raining, that is direct evidence that it is raining.

On the other hand, if all the blinds were drawn in this room and somebody came through the door over there with a dripping umbrella, that would be pretty good circumstantial evidence that it was raining outside. You wouldn't have seen it with your own eyes, but you would have the right to infer, seeing a man coming through the door with

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a dripping umbrella, that it was raining outside.

To be sure, he might have been standing in the shower in one of the rooms in this building that has a shower, but that is highly unlikely and the other inference is the likely one.

That, ladies and gentlemen, is an example given to you to help in making the inferences that you will have to make based upon the circumstantial evidence in this case.

Members of the jury, both the United States Attorney and defense counsel have from time to time throughout the course of this trial, although comparatively rarely, I must say considering the length of the trial and the strain that sometimes existed, objected in this case to the introduction of evidence and addressed arguments to the bench.

It is the duty of attorneys on each side of the case to make such objections when the attorney believes that the other side if proposing to put into evidence or ask questions about something that is not properly admissible. I want you to know that when I have sustained an objection to a question or when I have overruled an objection to a question, that doesn't indicate in any way any attitude of mine toward the merits or outcome of this case or how

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you should decide it. What it means, and the only thing it means, is that when I have sustained an objection, you are to disregard the question and draw no inference from the wording of the question as to what a witness might have answered had I allowed him to do so.

Now, ladies and gentlemen, that I have instructed you as to the manner in which you should consider the evidence and since you have heard a very, very long summary of the respective contentions of defense counsel and the government, I will turn to the substance of the charges against the defendants here.

The indictment, as you know, contains two counts. Each count is a separate crime and each of them must be considered separately by the jury as to each defendant who is named in that count.

This is as good a time as any for me to tell you that to assist you when you do make your decision one way or the other, I have prepared what is known as a verdict list so that when you have reached a conclusion your foreman can simply fill in a blank of not guilty or guilty as to the charge of the defendant and you will have recorded your verdict. I believe it will help you out. Of course, I will show it to defense counsel before it is delivered to the jury.

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The indictment names 11 defendants in all. The defendants Adams, Coviello, Mecca and Palmer are not, for reasons which are not of concern to the jury, on trial at this time. The only persons on trial before you now, of course, are the seven with whom you have become acquainted, although, as I will explain to you shortly, in considering their guilt or innocence you may have to determine the nature of the participation, if any, of others, that is, of the co-conspirators or of the co-defendants.

In the determination of innocence or guilt on all the charges, you must bear in mind, as I may have said before because it is so important, that guilt is personal. The guilt or innocence of a defendant on trial before you must be determined separately with respect to him solely on the evidence presented against him or the lack of evidence against him. The case of the defendants stands or falls on the proof or lack of proof of the charges against that particular defendant and not somebody else.

Of course, as you know, the guilt or innocence of a defendant must be determined beyond a reasonable doubt solely on the evidence against him.

Now, having got that important proposition out of the way, let me come specifically to the charges.

The charges in this indictment relate to violation

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of the United States Code, Sections 812, 841 and 846 of Title 21.

Title 21, Section 841, provides in pertinent part -- I am reading from the law passed by Congress -- "It shall be unlawful for any person knowingly or intentionally to distribute or possess with intent to distribute a controlled substance."

Section 846 makes it a crime to conspire or agree to commit such crimes, including the crime which I just read to you.

Section 812 defines controlled substances to include marijuana.

Count 1 charges that from August 1, 1971, and continuing up to and including December 7, 1973, the earliest date of the filing of these charges by the grand jury, the defendants -- and I won't read you their names because you know them -- unlawfully, intentionally and knowingly conspired and agreed together to distribute and to possess with the intent to distribute a controlled substance, that is, marijuana.

The indictment further charges that as part of the conspiracy the defendants wilfully and knowingly would import marijuana into the United States.

Further, the first count of the indictment charges

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that the defendants did certain acts called overt or open acts in furtherance of that conspiratorial agreement.

Count 2 charges that in May, 1972, the defendants possessed with intent to distribute a controlled substance, that is, approximately 500 pounds of marijuana and, as you know, from all the summations, the possession of that amount of marijuana is alleged to have occurred at the Rye Hilton Hotel in Rye, New York, or the Rye Town Hilton, whatever it is, on the date in question.

Now let us turn to the first charge, which for b2 ease of discussion I will call the conspiracy charge. Before you may convict any defendant under the conspiracy charge you must find that the government has proven beyond a reasonable doubt all of the following elements:

First, you must find the existence of the conspiracy charge. Obviously nobody can be guilty of belonging to a conspiracy unless there was a conspiracy as charged in the indictment.

Secondly, you must find that the defendant whose guilt or innocence you are considering at that time knowingly and wilfully associated himself with the conspiracy or joined it.

Third, you must find that at least one of the conspirators committed at least one of the so-called overt

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acts mentioned in the indictment, and which I will tell you more about shortly.

If the government fails to establish any or all, whichever way you look at it, of those essential elements beyond a reasonable doubt, then you must acquit the particular defendant whose case you are considering on that point. If it succeeds in proving all those things as to that defendant, then, of course, it is your duty to convict that defendant on count 1.

Now, the gist of the crime of conspiracy is the unlawful agreement to violate the law.

Ladies and gentlemen, I get worried sometimes about the instructions which we judges give -- I am departing from my charge, by the way, in telling you this -- the instructions which we give you about conspiracy because I think sometimes we instruct you to a fare-thee-well and I hope I won't overdo that today. There are a lot of things that it is important for you to know. But above all I think you need to have as your mooring for all of the discussion about conspiracy that a conspiracy is nothing more nor less than an agreement of two or more people, of course an intentional and knowing agreement, to violate the law. And if you bear that in mind, I think all of the other aspects of the instruction will be much clearer to you.

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Whether or not the defendant accomplished what it is alleged he and the others conspired to do is immaterial to the question of his guilt or innocence if a conspiracy does not come to fruition. A conspiracy need not come to fruition, need not be successful in order to constitute an illegal act or crime. It is the very conspiracy itself, together with at least the commission of at least one overt act, that creates the crime.

A conspiracy has often been called a partnership in criminal purposes in which each member, once you are satisfied that somebody became a member, becomes the agent of each other member.

I want to comment on that point there.

You may remember that early in the trial I explained to you that it was not possible always to put evidence in in a particular order that might be ideal and that some evidence might be put in as to a statement with regard to defendant X or by defendant X which might apply to defendant Y, but that it could only be applied to defendant Y if you found that defendant Y was, indeed, a member of the conspiracy. I want to remind you of that instruction again and I will shortly give you an instruction as to how you determine whether a defendant should be adjudged to have been a member of the conspiracy or not.

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But coming back now to the nature of a conspiracy itself, to establish the existence of a conspiracy the government is not required to show that two or more persons sat around the table and entered into a solemn compact orally or in writing stating that they formed a conspiracy to violate the law and setting forth the details of their plans. It would be pretty darn extraordinary if there was such a formal document or specific oral agreement.

Your common sense will tell you that when a man undertakes to enter into a criminal conspiracy which, by definition, means an agreement to violate the law, he is not going to announce it from the housetops and much is left to the understanding.

Conspirators do not usually reduce their agreements to writing or swear to them before a notary public.

It is sufficient if the government establishes to your satisfaction beyond a reasonable doubt that two or more persons, that would mean, of course, two or more persons are the defendant or co-conspirators named in this indictment, in any manner through any contrivance impliedly or tacitly or explicitly came tc a common understanding to violate the law. Express language or specific words are not required to indicate assent or attachment to a conspiracy, nor is it required that you find that all of the

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conspirators alleged in the indictment joined in the conspiracy in order to find that the conspiracy existed, but obviously you must find that at least two people did or you can't have a conspiracy.

In determining whether there has been an unlawful agreement, you may judge the acts and conduct of the alleged conspirators which are done to carry out an apparent criminal purpose. The maxim that action speaks louder than words is applicable here, as it often is in human conduct.

Often the only evidence available is that of disconnected acts which, however, when taken together and in connection with each other may show a conspiracy to secure a particular result as satisfactorily and as conclusively as more direct proof.

The offense is complete when the unlawful agreement is made and after any single overt act to effect the object of the conspiracy is thereafter committed by at least one of the co-conspirators.

Proof concerning the accomplishment of the conspiracy may be the most persuasive evidence of the existence of the conspiracy. So if you believe that the venture alleged here existed and was successful, the success itself may be the best proof of the existence of the agreement.

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In determining whether the conspiracy charged here did actually exist, you may consider the evidence of the acts and conduct of the alleged conspirators as a whole and the reasonable inferences to be drawn from such evidence. If upon consideration of the evidence you find beyond a reasonable doubt that the minds of at least two of the alleged co-conspirators met in an understanding way and that they agreed as I have explained to work together in furtherance of the alleged unlawful scheme, then proof of the existence of the conspiracy is complete. That is the first element.

Now, as you know -- and I am still talking about the first element, that is the conspiracy itself -- as I have said, the indictment charges and the government contends that the evidence adduced during the trial reveals a single conspiracy.

If you find that the evidence establishes that a number of steps and transactions were required in order to accomplish the goals of the conspiracy charged in the indictment and that all of the activities involved in these transactions were coordinated nevertheless by a central aim or purpose and that there was a nucleus of persons who had a basic community of purpose throughout all the transactions, then that would amount to a single overall

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conspiracy. This would be so even though there may have been a division of labor in fulfilling the objects of the conspiracy.

On the other hand, if you find that the evidence does not show one overall conspiracy but, instead, shows the existence of a number of separate and independent conspiracies, each with its own aims and objectives and each with his own separate nucleus or corps of conspirators, then you would have multiple conspiracies and the government would have failed to establish the single overall conspiracy as charged and in that event you would have to acquit the defendants on the charge of conspiracy.

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Moreover, even if you find that the government has proven a single overall conspiracy, you must then determine -- and this is the second element -- whether any particular defendant has become a member of it knowingly and wilfully in order to find that defendant guilty.

Let us talk about this second element, that is, membership in the conspiracy, individual membership in the conspiracy.

You cannot find Mr. X guilty of count 1 unless you find that Mr. X knowingly joined the conspiracy.

Let me be more specific for you. If you conclude that the conspiracy charged in this indictment existed, you

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must next determine whether the defendant whose guilt you are considering or, rather, whose case you are considering was a member or became a member, whether he participated in the conspiracy with knowledge of its unlawful purpose and in furtherance of its unlawful objectives.

To find a defendant's membership in a conspiracy you must find that he knowingly and intentionally participated in it. Thus, mere knowledge by a defendant of the existence of a conspiracy or of any illegal act on the part of another alleged co-conspirator or mere association with one or more of the co-conspirators is not sufficient in itself to establish membership. The government must establish beyond a reasonable doubt that the defendant under question was aware of the basic purposes and objects of the conspiracy, that he entered into it with a specific criminal intent and that was with the purpose to violate the law.

So if a defendant with an understanding of the unlawful character of the conspiracy intentionally engages, advises or assists for the purposes of furthering it, then he becomes a knowing and wilful participant or conspirator.

Whether or not a defendant was a member of the

conspiracy or joined the conspiracy must be determined-- I believe I may have said this before but I will stress it again -- on the evidence as to his own actions, his own conduct, his own statements and declarations, his own connection with the acts and conduct of the other alleged co-conspirators.

The guilt of a co-conspirator, if you find that there was a conspiracy and he joined it, is not governed by the extent or duration of his participation in the conspiracy or whether he had knowledge of all of its operations. Even if one joined the conspiracy after it was formed and was engaged in it to a degree more limited than that of some other co-conspirator, he may still be found guilty of conspiracy.

Each member of the conspiracy may perform, and usually does, separate and distinct acts at different times in different places. Some conspirators obviously play more important roles than others. But it is not required for the proof of the elements we have been talking about that a person be a member of the conspiracy from its very start or that he do everything that was done within the conspiracy. He may join it at any point during its progress and he would then be held responsible for all that has been done before he joined and all that

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would be done by the conspirators in pursuance of the conspiracy thereafter during its existence and while he remains a member.

Simply stated, again using the partnership analogy, a partner assumes the liabilities of the partnership, including those that occurred before he became a member. Thus, if you find that a given defendant is a conspirator, that is, became a member of it knowingly, then however limited his role in furthering the objectives of the conspiracy, he is responsible for all that was done in furtherance thereof before or during the conspiracy while he is a member.

Now we come to the last element with regard to the conspiracy, that is, the question of overt acts.

Assuming that you have found that the conspiracy charged existed and that a defendant whom you are considering was a member of that conspiracy or became a member of it knowingly, then the question arises whether any of the co-conspirators committed at least one of the overt acts charged in the indictment in furtherance of the conspiracy.

The purpose of requiring proof of an overt act is not inconsequential. It is that while parties may conspire and agree to violate the law, they could and they

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do change their minds and do nothing to carry out that plan. In that case no crime would be committed.

You and I can sit here and even plan to blow up the capital of the United States and talk about it for days on end, but if we never do anything about it, that is not a crime. The moment, however, that one of the co-conspirators does something in furtherance of the crime, then the crime is complete.

Now, it is true that overt acts as listed in the indictment generally speaking are not necessarily criminal in themselves. That does not mean, however, of course, that an action taken may not be sufficiently weigthy to be in furtherance of the crime.

If I phone you in connection with our plan to blow up the capital of the United States and suggest that we meet at a certain time and place, while it may be perfectly normal and not criminal to telephone people, that would be an act in furtherance of the conspiracy.

An overt act need not be a criminal act nor the very crime which is the subject of the conspiracy. The government is not required to prove that each member of the conspiracy committed or participated in any particular overt act since the act of any one conspirator done in furtherance of the conspiracy becomes the act of all the

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other members. 2132

Moreover, the government is not required to prove each of the overt acts that are alleged in the indictment, it is sufficient if it proves the commission of at least one of the acts by one of the co-conspirators in the Southern District of New York, which includes Rye, New York.

The overt acts here I will read to you so that you will be acquainted with them in case you have any difficulty in interpreting the indictment when you have it in your possession.

I am deliberately omitting overt act 1, which I have stricken from the indictment.

2. In or about February, 1973, the defendants James Adams, Dominic Mecca and Richard Belanger met and had a conversation in Florida.

3. In or about February, 1973, the defendant James Adams paid the defendant Robert Wilner approximately $12,000.

4. In or about February, 1973, defendant Robert Wilner as agent for Air Seas Charter Services, Inc., purchased a 24-foot Floton Seacraft boat in Fort Lauderale, Florida.

5. On or about March 6, 1973, defendant Steven Smith and co-conspirator Richard Thurlow boarded a boat in

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Miami, Florida.

6. On or about March 7, 1973, defendant Steven Smith and co-conspirator Richard Thurlow possessed approximately 700 pounds of marijuana on Williams Island, Bahama Islands.

7. On or about May 13, 1973, defendants Robert Wilner and John Doe, also known as Anthony, boarded an airplane at John F. Kennedy International Airport in the City of New York and flew to Fort Lauderdale, Florida.

8. In or about May, 1973, defendant John Doe, also known as Anthony, and co-conspirator Gerald Mitchell drove from Fort Lauderdale, Florida, to the Rye Town Hilton Hotel in Port Chester, Westchester County, New York.

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Ladies and gentlemen, I said before that Rye was in the Southern District of New York as it is, but I now see that the Rye Town Hilton is in Port Chester, New York, and I instruct you that Port Chester is also in the Southern District of New York.

Again, in or about May, 1973, defendants Robert Wilner, Dominic Mecca and John Doe, also known as Anthony, and co-conspirator Gerald Mitchell met at the Rye Town Hilton Hotel in Port Chester, Westchester County, New York and had a conversation.

10. In or about June, 1973, defendants Robert Vissa and Nicholas Calabro and co-conspirator Gerald Mitchell drove from the State of Maine to Stamford, Connecticut where they met and had a conversation with defendants John Doe, also known as Anthony, and Robert Wilner.

11. On or about June 10, 1973, the defendants John Doe, also known as Anthony, and Gary Stephan boarded a boat in Fort Lauderdale, Florida.

12. On or about June 11, 1973, defendant Robert Wilner and co-conspirator Gerald Mitchell landed an airplane on Long Island in the Bahama Islands.

13. On or about June 11, 1973, defendants Richard Palmer and Robert Vissa landed an airplane on Long Island

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in the Bahama Islands.

14. In or about June, 1973, defendants Paul Stephan, Dominic Mecca, Nicholas Calabro, Robert Wilner, Robert Vissa and Richard Palmer and co-conspirator Gerald Mitchell met at Pier 66 hotel, Fort Lauderdale, Florida, and had a conversation.

15. In or about June, 1973, defendants Gary Stephan and John Doe, also known as Anthony, returned to Fort Lauderdale,Florida, by boat.

16. In or about June, 1973, co-conspirator Gerald Mitchell possessed approximately 260 pounds of marijuana.

Ladies and gentlemen, I have completed the definition of the elements of conspiracy which is the charge contained in count 1. I do want to say this:

While the indictment charges that the conspiracy existed from on or about the 1st day of August, 1971, and continuously thereafter up to and including December, 1973, which is the date of the filing of the indictment, it is not essential as a matter of law that the government prove that the conspiracy started and ended precisely on those dates, it is sufficient if you find that, in fact, a conspiracy was formed and existed for some time within the period set forth in the indictment and that at least

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one of the overt acts was committed in furtherance of the conspiracy during that period.

A conspiracy, once formed, is presumed to have continued until its object is accomplished or until there is an affirmative act of termination by its members or it is otherwise clearly terminated, as, for example, by arrest of the defendant.

So, too, once a person is found to be a member of a conspiracy, he is presumed to continue his membership until the termination of the conspiracy, unless there is affirmative proof of his withdrawal or his disassociation from it.

Now, ladies and gentlemen, I have finished instructing you with regard to conspiracy. We come now to the law with regard to count 2.

The second count of the indictment, that is, the substantive count, as we call it, charges the defendants with the unlawful possession with intent to distribute 500 pounds of marijuana.

Before you can find any defendant guilty on count 2, you must be convinced beyond a reasonable doubt that the government has proven all of the following elements of the crime.

First, that on or about the date alleged, which

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is May, 1973, the defendant under consideration possessed with the intent to distribute the marijuana specified in the count.

Second, that the substance possessed with intent to distribute was marijuana.

And third, that the defendant under consideration did what he did unlawfully, wilfully and knowingly.

You will note that the first element of the offense is to possess with intent to distribute. What does that phrase mean? Well, the word distribute means, as you would expect it to, to transfer or deliver other than by administering or dispensing a controlled substance. In other words, there are legitimate ways to dispense controlled substances and we are not talking about those.

It is not necessary that the government prove that the defendant actually controlled the substance, but only that he possessed it with the intent to distribute it on or about the date charged.

Ladies and gentlemen, that instruction is not accurate and I ask you to strike that.

It is necessary to show that he possessed it with the intention to distribute it, and I will talk about control of the marijuana in a moment.

The law recognizes two kinds of possession and

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I think probably we do in our daily lives, too, although we are not so conscious of it.

First is actual possession. I have this piece of paper in my hand. I actually possess it. A person who knowingly has direct physical control over a thing at a given time is then in actual possession of it. But a person who, although not in actual possession, has the power, the power at a given time to exercise dominion or control over a thing, is then in what the law calls constructive possession of it.

The law recognizes, also, that possession may be sole or joint, that is, a thing may be possessed by one person or by more than one person. If one person alone has actual or constructive possession of the thing, possession is sole. If more than one person does, then it is joint.

If you find from the evidence beyond a reasonable doubt that any of the accused either alone or jointly with others had actual or constructive possession of the substance as described in count 2, then you may find that that substance was in the posssession of the accused within the meaning of the statute.

The word intent, that is, with intent to distribute, refers to a person's state of mind, of course, so the term to possess within intent to distribute can be fairly stated

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to mean to possess or control an item with the state of mind or purpose of transferring or deliverng that item.

That is the first element of count 2.

The second element you must find beyond a reasonable doubt with regard to count 2 is that the substance referred to in count 2 was, indeed, marijuana. I instruct you as a matter of law that marijuana is a controlled substance, but you must find that the substance which is referred to in count 2 was marijuana and you must make such a finding, of course, as you do all your other findings, beyond a reasonable doubt. I will say more about that hereafter.

The third element which you must find as to count 2 if you are to convict any defendant is that the possession of the marijuana occurred wilfully, knowingly and intentionally. These words mean that you must be satisfied beyond a reasonable doubt that the defendant whose guilt you are considering knew what he was doing and he did it deliberately and voluntarily as opposed to mistaken or accidentally

b5 or under a mistaken assumption.

Now, knowledge and intent exist in the mind. It is not possible to look into a person's mind physically to see what goes on there. The only way you have for arriving at a decision on such questions is to take into consideration,

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as you do all the time in your daily lives, the facts and circumstances shown by the evidence, including the exhibits, and to determine from all such facts and circumstances whether the requisite knowledge and intent were proven to you beyond a reasonable doubt.

Direct proof of knowledge is unnecessary. Of course, if there were such proof it would be the best there could be, but the only way you could get direct proof of a person's intention is for him to have said or somebody else to have testified that he said, "I meant to do that." That rarely occurs. But knowledge and intent may be inferred from all the surrounding circumstances.

Now, there are two other alternate bases beyond those that I have described to you on which findings of guilt may be found as to count 2, but it still requires proof of the high degree which I have previously mentioned, that is, beyond a reasonable doubt.

Any person who commits an act in violation of a criminal statute, of course, commits a crime. But it is also a crime not only to commit an illegal act, but to aid or abet another person to commit that crime. The second crime, if you want to call it a crime, or the second basis to be held liable for a crime is the legal principle that anyone who aids and abets another one to commit an illegal

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act is also guilty of committing that act.

Accordingly, if you should find beyond a reasonable doubt that any of the defendants named in count 2 or any of their co-conspirators committed the crime charged in count 2 and that another defendant aided or abetted that defendant, you would have a sufficient basis for finding T5 the guilt of the second person as to count 2.

Now, what does aid and abet mean? To find that a defendant aided or abetted another to commit a crime, you must find that the allegedly aiding and abetting defendant in some positive, clear way associated himself with the criminal venture, that he participated in it not just casually but as something he clearly wished to bring about. In other words, you must find that he sought by his actions to make the venture succeed.

Thus, in order to find the defendant guilty of aiding and abetting, you must of course find something much more than mere knowledge on his part that a crime was being committed. For a mere spectator at a crime is not a participant, however unfortunate his conduct may be. If you stood watching somebody else hold up a man with a gun, you would not be, by that alone, aiding and abetting that man. In order to convict, it is not necessary, however, that you find that the defendant himself did the acts.

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There is, finally, another alternative basis upon which you may find a defendant named in count 2 guilty. This alternative basis is as follows: If you find beyond a reasonable doubt that the offense charged in count 2 was committed by one of the defendants who was a member of the conspiracy, and that another defendant was then a member of the conspiracy and that the acts which constituted the offense in count 2 were done in furtherance of the conspiracy of which B was a member, B being the second defendant, and that the second defendant might reasonably have foreseen that those very acts would be done by the first defendant, then you may find that the second defendant is guilty of the offense alleged in count 2 even though he didn't personally participate.

Let me be more specific. If you and I agree to commit an illegal act, and if you go ahead and actually commit that act, and if that act was in furtherance of our conspiracy and I could reasonably tell that as part of this conspiracy you would commit that act, then even if I didn't help you, I may be found guilty of having committed that act.

Now, ladies and gentlemen, as you know, there has been evidence in this case, at least on one occasion, when Richard Palmer met with Robert Wilner and another

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occasion, when Palmer met with Robert Wilner, Mecca and Belanger, that he was equipped with recording devices, and you've heard tapes resulting from that.

I am instructing you as a matter of law, and I think I took this up with you at the beginning of the trial, before you were chosenac jurors, that the use of such devices in the manner described in this case is entirely within the law and does not violate anyone's rights. This is because Richard Palmer, who was a participant in the conversations, consented to have them recorded. Accordingly, whatever your private views may be as to the desirability or undesirability of the law's policy on that subject, you must be governed by the law, which is that there is nothing illegal about such recording.

One or two more items to bring to your attention. I told you earlier that you must under count 2 determine to your satisfaction beyond a reasonable doubt that the substance possessed at the Rye Hilton Hotel in May, 1973, was marijuana. I instruct you, as I told you before, that marijuana is a controlled substance.

Now, just as with any other component of a crime, the existence of and dealing with marijuana may be proven by circumstantial evidence. There need be no sample placed before the jury, nor need there be testimony, although

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there was some, by chemists, as long as the evidence furnishes a base for inferring that the material in question was marijuana. The evidence is before you and you have to determine whether you are satisfied beyond a reasonable doubt on that point.

Ladies and gentlemen, in every criminal case there is a fundamental rule which every defendant has the right to rely on. That is the rule that no defendant may be compelled to take the witness stand or offer any testimony whatsoever. Pleading not guilty, a defendant has in effect denied the charges on which he is being tried and denied every material issue against him stated in the indictment. It is the prosecution which must prove him guilty, and he cannot be required to testify or to disprove anything.

Any accused person has the right to stand mute. The fact that he does not take the stand, as the defendants in this case have not, may not be considered by you as any indication of guilt or as an admission of guilt or as evidence or an inference of guilt.

Now, that's not just an artificial rule. If you were accused of a crime, you would feel that there was no reason for you to prove your innocence. However thoroughly you might be convinced of that innocence or knew of it, you would understand that it was the government's job to

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prove you guilty if it could, not as a contest but if that's what the facts are.

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Ladies and gentlemen, I've come near the end of my formal instructions, but in a sense the most important part of the case is the part which you now are to play as jurors, because it is for you and you alone to decide whether any of the defendants are guilty on either of the counts charged.

I know that you'll try the issues that have been presented to you in accordance with the serious oath that you took as jurors, in which you promised that you would well and truly try the issues joined in this case and, as you probably remember from my repeating it time after time when I was impaneling this jury, based solely on the evidence which you have had put before you in this courtroom and the instructions as to the law which I am now concluding in giving you.

I like that phrase "well and truly try the issues joined in this case" - it goes back a thousand years, and it's old fashioned flavor should mean something to you and remind you of the hundreds of thousands of juries who have performed this function before you - and that "you must a true verdict render based upon the evidence you heard in this court and the exhibits."

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In order for you to reach a verdict of either not guilty or guilty as to any defendant on either count, your verdict must of course be unanimous. That is, everybody must agree as to that particular verdict.

Now, in spite of that requirement of unanimity, each of you must decide each count as to each defendant individually in accordance with your own consciences, but only after deliberation with your fellow jurors to determine whether you believe a just verdict is being reached. You shouldn't hesitate to change your mind if you become convinced that your original view of the case was not in accordance with the facts and the law. On the other hand, you should not change your minds just for the purpose of reaching a verdict as a matter of convenience.

I haven't any reason to believe that this jury won't be able to reach a unanimous verdict one way or the other as to the matters put before it.

To sum up, if you find there is a reasonable doubt that the law has been violated, you should not hesitate for any reason to find a verdict of acquittal. But on the other hand, if you find that the law has been violated as charged, you should not hesitate because of sympathy or any other reason to render a verdict of guilty.

Nothing that I have said in these instructions,

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and I stress this, whatever it may be, is intended to indicate any view of mine towards how the various issues put before you should be decided.

Now, ladies and gentlemen, according to custom, juror number 1 normally acts as the foreman of the jury. Our friend juror number 1 here has expressed to me the wish that he should not serve, and I am honoring his wish. I have spoken to Mrs. Taxman, who is juror number 2, and told her that for the purposes of objectivity and not trying to choose or pick among you I would like to see that she serves as forelady, and she has kindly agreed that she would. That doesn't mean that she has any authority that the rest of you do not have but just that she will assist in seeing to it that your deliberations are orderly and that all communications to the court are properly made.

Mrs. Taxman, I understand that you have once before served as a forelady and I'm glad to know that. You will remember that you have the right at any time, and I am telling this to all of you ladies and gentlemen, to ask for the exhibits or any one of them. You have the right to have any of the testimony read to you or any of the tape exhibits played for you. You have the right to put any questions that you want to the court.

If you do wish to have any testimony read back to

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you or any other exhibit, it would be helpful if you could be as specific as possible about the material that you are interested in so that we can be assisted in locating that material. And, of course, the way that you will get in touch with us will be to give a note to the marshal, who will be standing outside the door of your jury room. I am neither encouraging nor discouraging your asking for things but certainly want you to have whatever you want.

It is not my practice, ladies and gentlemen, to send in all of the exhibits, plunk them down on the jury room table and leave them there. However, if you would prefer, when you start your deliberations, to have all of the exhibits before you, all you have to do is to write a note saying you want all the exhibits. And if, on the other hand, you just want some of the exhibits, you can ask for them.

I will also say, because sometimes a jury asks that the judge's charge be sent in to them, that I will not send my charge in to you. I hope it has been clear. But if it has not been clear, then I am afraid it would be less clear if I sent it in to you and you all tried by yourselves to figure out what it meant. If you have any questions as to what my charge is, simply write me a note saying you have a question and come on out and tell

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me what your question is or specify the question in your notes. Counsel and I will sit down and talk about it and, I believe, will agree on what the answer is. Fortunat for me, if we don't agree, then I will tell you what the law is.

Ladies and gentlemen, I have now come to the end of my instructions. I want to confer withcounsel in the robing room and see whether they feel that anything I have said requires clarification. It won't take us very long. Please remain in the jury box and we will be right back.

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(In the robing room.)

MR. SHAW: Your Honor, before we take up the charge, I would just like to list an objection to the summation, and that was the comment from the prosecutor, "heard from Smith." I would point out that --

THE COURT: I've pointed out that the prosecutor immediately indicated that that was incorrect, and whatever motion you are making with regard to that is denied as in my belief not prejudicial. But I understand the reason for your making the motion.

MR. THAU: Since Mr. Shaw referred to summations, I will also. You will remember that there came a point--

THE COURT: Gentlemen, I am sorry to interrupt,

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but we have the jury sitting out there. Let's get the charge out of the way first. Any of these loose ends can be taken care of later.

MR. LA ROSSA: I have an exception to the charge, if you like.

THE COURT: Yes, I assume people will.

Go ahead, Mr. La Rossa.

MR. LA ROSSA: I respectfully except to that portion of the charge wherein you directed the jury that they may not consider the August, 1971, incident and, I think you said, the August, 1973, incident. Am I right? I respectfully submit that that vitiates the Kotteakos argument, and for that reason I except.

THE COURT: Yes. I believe you made the argument at an earlier time.

Anybody who is affected by that it is understood has such an exception.

MR. LA ROSSA: I have no other exceptions to the charge.

MR. ABRAMOWITZ: I have an exception. When you mentioned the tapes, you only mentioned the Palmer-Wilner and the Palmer-Belanger tape as being legal tapes. I would appreciate it if your Honor would tell the jury that the Mecca-Vissa-Mitchell tape is perfectly legal since

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it had the consent of at least Mecca.

THE COURT: All right. You are entirely correct in requesting that. All right.

Next?

MR. HOFFMAN: I would request of the court that your Honor instruct the jury that any defendant who may have in fact done an overt act as charged, that the mere doing of such act if it was not in and of itself a crime is not in fact any evidence that the participated in the conspiracy. I think they may have gotten the impression that if any defendant did an overt act then he was a member of the conspiracy. He may have done it totally innocently.

THE COURT: Next?

MR. THAU: Your Honor, I am not trying to use your exact words, but I think I probably have them. Your Honor said that there was evidence that when Palmer met with Wilner and Belanger and Mecca he was equipped with a recording device.

The wording there, in my mind, presupposed that it was a proven fact that there had been such a meeting and that your Honor was only addressing himself to the fact that wearing that kind of an apparatus was legal. Now, we made much on the defense side, I think, I certainly did, of the contention that there wasn't such a meeting. I think

it left with the jury that there was a meeting, that there was a recording of these two defendants now on trial.

MR. LA ROSSA: I am afraid I forgot that, and I agree. Can you just tell the jury that the existence and reliability of all the tapes is a question of fact for them to determine.

THE COURT: Well, yes. But will that correct what you have in mind or do you want me to tell them that the defendants contend there was no such meeting?

MR. THAU: That's right.

THE COURT: I'll be glad to tell them that. I frankly don't think that they assumed because I said that that the meeting occurred. But all right.

Next? Anybody else?

MR. LA ROSSA: You are including mine?

THE COURT: What is that?

MR. LA ROSSA: When you tell them about the tapes, as Mr. Thau just asked, would you tell them that the existence and reliability, if any, of the tapes is a question of fact for them to determine.

MR. THAU: As well as whether that meeting was ever held.

MR. ABRAMOWITZ: Your Honor, I just have one last one.

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THE COURT: Yes.

MR. ABRAMOWITZ: That is, at the end of your charge you said that it is your job to decide whether the law has been violated. I think if your Honor would amend that by any one of the defendants or all of the defendants, it would be a little more accurate.

The law could have been violated by the three government witnesses.

THE COURT: I am not going to do that. I've been terribly specific about indicating personal guilt, I mean the personal nature of guilt.

I think I've heard from all defendants. Have I not?

Mr. Truebner?

MR. TRUEBNER: The government doesn't have anything specific, your Honor, except, as to the question of tapes, if the court is going to charge that the defendants Wilner and Belanger contend that there was no such meeting --

THE COURT: Certainly. The government does.

MR. LA ROSSA: You are just going to say the defendants contend?

THE COURT: I am going to say the defendants contend there was no such meeting, the government contends there was, it is for you to decide.

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MR. TRUEBNER: Will your Honor send a copy of the indictment in? I just want to make clear that we are working with an amended indictment in the sense that even though a superseder was never filed counsel all agreed that the indictment that was filed contained the words "narcotic drug controlled substance."

THE COURT: I remember that. That was changed.

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MR. TRUEBNER: I have a clean copy here. We can excise over that number 1 with a pair of scissors or we can block it out or just cut out a little box there if we have a pair of scissors. Maybe the clerk has one.

THE COURT: We can do that immediately after they are going.

MR. LANNA: Can we come back in later after the government's summation?

THE COURT: Yes.

(In open court.)

THE COURT: Two points here.

Both sides would like me to amplify what I had to tell you about the tapes in various ways. The first remark I want to make is that of course the existence of the tapes, the reliability of the tapes is a matter of fact, and being a matter of fact it is for you to decide how reliable they are.

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Second. I want to remind you that because I mentioned certain conversations involving Mr. Wilner, Mr. Belanger and Mr. Palmer did not mean to suggest that the tapes played as to conversations between Mr. Mitchell and Mr. Mecca and including Mr. Vissa are not also legal. Of course they are, because Mr. Mecca consented to their being taped in the same way that Palmer consented as to the other tapes.

Finally, the fact that I gave you an instruction about any of these tapes, and in particularly about the tape of an alleged meeting at which Mr. Wilner, Mr. Belanger and Mr. Palmer were present does not mean that I am saying that that meeting is proven or disproven. I am not commenting on whether the meeting occurred. I am just commenting on the legality of the tapes.

Now, one of the counsel was somewhat concerned that you might think, as a result of what I explained to you about the nature of an overt act and the requirement that it be proven that one of the co-conspirators commited an overt act -- they were worried that you might think that the commission of an overt act is in itself a crime.

I think I pointed out to you that you may commit an overt act without committing a crime. And even in the situation here, if you did not know that the overt act you

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were committing was in furtherance of the crime, you, yourself, of course, would not be guilty. In other words, the commission of an overt act must be knowing. The person doing it must know that it is in furtherance of the conspiracy, in order for it to be legally effective.

I think I have covered all of the points that counsel asked me to take up with you at this time. Have I not, gentlemen?

And I am therefore ready for you to commence your duties, ladies and gentlemen, with one exception.

Does anybody want to look at this list before I hand it over to Mrs. Taxman? There is nothing unusual about it.

I will ask the clerk, then, to deliver this verdict list to Mrs. Taxman and I will ask him after that to swear the marshal.

Oh, there is one further duty that I have. I remember that Mr. Whitman asked me when we started the trial in this case what an alternate juror did. Now, Mr. Whitman, yes, you have now done what an alternate juror does. You have sat through the entire trial. And since all 12 of the regular jurors are here, it is with regret in the sense that I excuse, but also with very deep thanks that I excuse, you and and Mr. De Carlo. The law doesn't permit

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the alternate jurors to deliberate with the regular jurors but only to substitute for them if any of them are absent.

I hope that you won't feel frustrated in not being able to deliberate, but I certainly do thank you and Mr. De Carlo for the really exceptional behavior that you and all the other members of this jury showed. Counsel said it and I've heard counsel butter up juries before, but I'll do it this time and I have nothing to gain. And it is true; this has been the promptest, most regular, most attentive jury that I've seen in the court in a long time, and I am now beginning to have been here long enough to be entitled to say that.

Thank you, gentlemen, and you two are excused.

(Two alternate jurors discharged.)

(A United States Marshal was sworn.)

THE COURT: Ladies and gentlemen, you may now commence your deliberations. I want to tell you ladies and gentlemen that I will make arrangements, which I believe we can do here in court, if you go home after dark, for transportation in a car. So you need not be concerned. We can arrange that.

All right, ladies and gentlemen, you may commence your deliberations, please, and I will see counsel in the robing room.

(At 3:42 P.M. the jury retired to commence their deliberations.)

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(In the rooing room.)

THE COURT: Gentlemen, before we go to your objections, I would like to say that I will go up to chambers as soon as we are finished with the motions or whatever they are.

As far as exhibits are concerned, I don't see any reason why there should be any problem. If the jury asks for any exhibit, I assume you will be able to agree and just let the clerk give it to the marshal.

If any questions are asked with regard to my charge, or any other legal questions, I will of course come down and answer them after having conferred with you.

If there are requests for the reading of any portion of the record or the playing of any tapes, I would like to ask you to do the leg work necessary to locate the information before I come down. And where in your opinion there is no real question as to what the jury wants to hear, I would just as soon not come down to hear it. But if you feel that there are going to be questions that I have to decide as to whether more or less should be read or whether the cross-examination should be read, of course I will come down.

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MR. LANNA: I will move at this time for the withdrawal of a juror and a mistrial as a result of the

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closing argument of the government, more specifically as to two points.

I feel that Mr. Truebner made himself an unsworn witness and also was inflammatory and prejudicial when he designated positions as to the so-called "board."

THE COURT: I thought that was beautiful.

MR. LANNA: I thought that was completely uncalled for. We have only ourselves to blame for it. I don't recall which defense counsel raised it. But I don't think that gave Mr. Truebner the right to become a so-called unsworn witness and designate the positions on the "board."

THE COURT: I thought it was fair comment.

MR. LANNA: In addition I thought it was inflammatory and prejudicial when he at the very conclusion of his argument played, I think, on the prejudice of the jury relative to ridding ourselves in this area of the country of the narcotics problem and that an acquittal of course would only license these individuals, and I'm using the words in substance now, to return to Williams Island.

THE COURT: I would have preferred that there had been no reference to the narcotics, and I saw you and Mr. La Rossa shaking your heads, and maybe I would have preferred it just because I did see you shaking your heads, but I believe that I emphasized to the jury the fact that

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they should disregard what the subject matter of the indictment was, and in any event I didn't find Mr. Truebner's remark prejudicial, although I thought it was perhaps a little poorly chosen.

I think it is only fair to the government for me to observe, in case an appellate judge reads what I am now saying, that I felt that Mr. Truebner's summation was made in a very calm, dispassionate tone and that that is something which must be taken into consideration by the trial judge in reaching a decision on these matters.

MR. THAU: I would make a motion similar to Mr. Lanna's on the ground that in this case, particularly where both sides had daily copy, I think that has some bearing on it, and therefore where every attorney here was more conscious of what the evidence was than in the run of the mill case, and where my client's name does not appear in the evidence past the March trip, Mr. Truebner chose to say that after March the whole bunch of them, undaunted, marched right ahead and continued, and further went on to describe my client as some sort of executive officer on this "board," keeping in mind that this so-called board meeting was not held until June or July, several months after my client's last appearance in the evidence.

THE COURT: Okay. I disagree with you, Mr. Thau,

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but I understand your position.

Mr. Shaw, you have to have the last word.

MR. SHAW: Sorry, your Honor.

Just to expand on the point that Mr. Lanna so eloquently made, I would point out to the court that the President's Commission on Marijuana has decreed that marijuana is not a narcotic, and I think that that remark was out of order.

And I made several objections earlier in the case, two in regard to what learned counsel Mr. Thau said. I object to the fact that Mr. Truebner read from the record something that I specifically noted in my summation yesterday that the witness charged his testimony in regard to, and that is where there was testimony on the part of Richard Thurlow that my client was speaking or that they were conversing about certain points A, B and C in running against patrol boats.

There was specific testimony in the record by Thurlow that, no, we didn't have a conversation, and thereafter by Mitchell, who stated unequivocally there was no conversation.

THE COURT: Very good.

Cheer up. Everybody may be acquitted.

I just want to tell you, gentlemen, that it

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has been a pleasure to work in this case with you. It was not the easiest case in the world, for reasons none of us had control over, but it was a very interesting case. And whatever the outcome, I enjoyed working with you.

B6 (In open court in the absence of the judge and jury.)

MR. SPARROW: After conferring with Judge Lasker as to the possibility of a verdict so far as the defendant Nick Calabro is concerned, it is agreeable to the defendant and I enter a stipulation on the record that either Mr. La Rossa or Mr. Lanna may take the verdict on behalf of this defendant in the absence of myself.

Is that agreeable with you, Mr. Calabro?

DEFENDANT CALABRO: Yes, it is.

MR. SPARROW: Thank you.

Similarly, the two named defense counsel may act on my behalf in responding to any inquiry made by the jury pertaining to this defendant along with the others.

(At 6 P.M., a note was received from the jury.)

(In open court in the absence of the judge; jury present.)

THE CLERK: Ladies and gentlemen, I received your note. I was informed by the judge to give the indictment, which I did, and have the court reporter read the part of

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the transcript that you requested. I will read it. As soon as you have what you want, let us know and we will stop.

(A portion of the direct examination of the witness Palmer was read to the jury.)

THE CLERK: Madam forelady, is that enough?

THE FORELADY: Yes. Thank you very much.

(At 6:05 P.M. the jury returned to the jury room to continue to deliberate upon a verdict.)

(Court Exhibit 2 marked for identification.)

(At 9:10 P.M., a note was received from the jury.)

(In the robing room; counsel present.)

THE COURT: "The jurors would like to know the following:

"Would it be possible for a defendant to be found not guilty on the first count and guilty on the second count?

"Second. May we see the hotel registration and airline ticket exhibits."

I invite your comments on the first question.

MR. LA ROSSA: Yes.

MR. LANNA: Yes.

MR. ABRAMOWITZ: The answer is yes.

THE COURT: I agree with you.

MR. THAU: Not to each of the defendants as I see it.

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THE COURT: Those who are charged and not been acquitted.

MR. LA ROSSA: Yes.

THE COURT: I can't use the word acquitted, but those whose cases still remain before them.

All right. Would you bring in the jury, please, and I will answer these questions.

Will you, Mr. Truebner, arrange to get the exhibits?

MR. TRUEBNER: Yes, your Honor.

(At 9:20 P.M., in open court; jury present.)

THE COURT: Good evening.

I hope you are not tired and have had a very satisfactory dinner.

I have received your note, which I will ask the court clerk to mark as a court exhibit after I finish discussing it.

"Your Honor, the jurors would like to know the following:

"Would it be possible for a defendant to be found not guilty on the first count and guilty on the second count?"

The answer to that question is yes, with the following proviso, that is, of course, it would only be to those who are named there in count 2 and with the

exception of Mr. Calabro and Mr. Smith.

The second part of your note says, "May we see the hotel registration and airline ticket exhibits."

I have asked the clerk to make those available to you, which he will do in just a moment.

Will you return to the jury room and continue your deliberations.

(Court Exhibit 2 marked for identification.)

(At 9:25 P.M., the jury returned to the jury room to continue to deliberate upon a verdict.)

MR. THAU: Pardon me, your Honor.

THE COURT: Mr. Thau?

MR. THAU: Yes.

Your Honor recalls that [illegible] when your Honor consulted us about the note in the [illegible], most of the counsel's answers to the [illegible] may remember my saying, "Not [illegible], of course, we came in here [illegible] tions, the answer to the jury.

It occurs to me in Mr. [illegible] the answer ought to have been [illegible]

You will recall that [illegible] ever concerning him after the [illegible] which if he were acquitted [illegible]

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such possession as there was in May could not be in furtherance of a conspiracy of which he was acquitted.

As to the aiding and abetting, certainly since there was no evidence concerning any such aiding and abetting concerning that May possession that is out, and certainly no one here contends on his part there was any actual possession at Rye Town.

THE COURT: The only comment I can make is that it should be a finding that Mr. Belanger or anybody else is guilty on count 2 and counsel urge me to review the evidence and to indicate I have made an incorrect ruling, I would do so and correct the situation at that time.

MR. THAU: Thank you, your Honor.

THE COURT: Gentlemen, I will be in chambers.

I wanted to say it is my plan to let the jury go about 10 o'clock.

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(At 9:50 P.M., in open court; jury present.)

THE COURT: Mrs. Taxman, I understand the jury has reached a verdict, is that correct?

THE FORELADY: Yes.

THE COURT: I will ask the clerk to call your names and to receive the verdict.

(Jury roll called; all present.)

THE CLERK: Madam forelady, has the jury reached a

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verdict?

THE FORELADY: Yes, we have.

THE CLERK: How do you find for Richard Belanger on count 1?

THE FORELADY: We find Richard Belanger guilty.

THE COURT: On count 1?

THE FORELADY: On count 1.

THE CLERK: And Richard Belanger on count 2?

THE FORELADY: Guilty.

THE CLERK: Nicholas Calabro on count 1?

THE FORELADY: Not guilty.

THE CLERK: Steven Smith on count 1?

THE FORELADY: Not guilty.

THE CLERK: Gary Stephan on count 1?

THE FORELADY: Not guilty.

THE CLERK: Gary Stephan on count 2?

THE FORELADY: Not guilty.

THE CLERK: Paul Stephan on count 1?

THE FORELADY: Not guilty.

THE CLERK: Paul Stephan on count 2?

THE FORELADY: Not guilty.

THE CLERK: Robert Vissa on count 1?

THE FORELADY: Guilty.

THE CLERK: Robert Vissa on count 2?

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THE FORELADY: Guilty.

THE CLERK: Richard Wilner on count 1?

THE FORELADY: Guilty.

THE CLERK: Richard Wilner on count 2?

THE FORELADY: Guilty.

THE CLERK: Ladies and gentlemen of the jury, listen to your verdict as it stands recorded.

You say you find the defendant Richard Belanger guilty on count 1 and count 2; you find Nicholas Calabro not guilty on count 1; you find Steven Smith not guilty on count 1; you find for Gary Stephan on count 1 not guilty, on count 2 not guilty; you find for Paul Stephan on count 1 not guilty, on count 2 not guilty; on Robert Vissa, on count 1 you find guilty, on count 2 you find guilty; on Robert Wilner on count 1 guilty, on count 2 guilty. And so say you all.

THE FORELADY: We do.

MR. LA ROSSA: I ask that the jurors be individually polled, may it please the court.

THE COURT: All right. Please poll the jurors.

THE CLERK: Ladies and gentlemen of the jury, listen to your verdict as it stands recorded.

THE COURT: I don't think you need to repeat it, simply ask each of the jurors if the verdict announced is

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their verdict.

(Each juror, upon being asked, "Is that your verdict?" answered in the affirmative.)

THE COURT: Ladies and gentlemen, it is a solemn moment. I want to express again my appreciation for the sense of responsibility with which you have discharged your duties.

I don't for a moment under-estimate the difficulty of reaching the verdict that you have reached. I have to do the same job myself from time to time when I try people without a jury. I again thank you for the faithfulness with which you have served. I trust that you will leave this building believing that the American system of justice does its best, which is all that anybody can ask, andwe come as close as possible to human truth.

Thank you very much. You are discharged with the thanks of the court.

(Jury discharged.)

(In the robing room; counsel present.)

THE COURT: Mr. Hoffman, counsel whose clients have been acquitted are excused. Again, I say it was nice to work with you and I am glad for you and Mr. Smith and for me that we avoided some of those thorny questions which you have posed.

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MR. HOFFMAN: Thank you. It has been a pleasure.

(In open court.)

THE COURT: Gentlemen, I think we have to set a sentencing date.

Mr. Clerk, I think July is seven weeks from today.

That will be July 12th, at 10 A.M. in room 2703. At least it is the 27th floor, I am not sure which of the two courtrooms I will be in.

I wish to address Mr. Wilner and Mr. Vissa and Mr. Belanger.

Gentlemen, I take it that the government will not object to continuing your present bail arrangements. Is that correct?

MR. TRUEBNER: That is correct, your Honor, no objection.

THE COURT: But you are responsible to appear before the Probation office of this court at the beginning of next week in accordance with arrangements to be made by counsel to commence the pre-sentence investigation and, of course, you are responsible to appear for sentence on July 12th at 10 o'clock in the morning.

I don't expect you not to appear, but any failur to appear will constitute a separate crime which will be separately punishable and you should know that.

MR. THAU: Thank you, your Honor.

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JUDGMENT AND PROBATION/COMMITMENT ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
UNITED STATES OF AMERICA,

v.

No. 73 CR 1102

ROBERT WILNER,

Defendant.
----------X

In the presence of the attorney for the government the defendant appeared in person on this date, 12-2-74, with counsel, James La Rossa.

PLEA - NOT GUILTY

There being a verdict of GUILTY.

Defendant has been convicted as charged of the offense of distribution and possession with intent to distribute marihuana and conspiracy so to do in violation of Title 21, Section 846, 963, 841(a)(1)(b).

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed

to the custody of the Attorney General or his authorized representative for imprisonment for a period of ONE (1) year on count one but the execution of the sentence of imprisonment is suspended. The defendant is placed on probation for a period of THREE (3) years on count two.

/s/ Morris E. Lasker
UNITED STATES DISTRICT JUDGE

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA,

v.

No. 73 CR 1102

ROBERT WILNER, et al.,

Defendants.

----------X

S I R :

PLEASE TAKE NOTICE that ROBERT WILNER hereby appeals to the United States Court of Appeals for the Second Circuit from a Judgment of Conviction entered against him by the Hon. Morris E. Lasker, United States District Judge for the Southern District of New York, on December 2nd, 1974, wherein the defendant was sentenced on Count one of the Indictment charging him with violation of Title 21, United States Code, Section 846, to one year imprisonment, the execution of sentence suspended, and one year on Count two of the Indictment charging violation of Title 21, United States Code, Sections 812,

841(a)(1) and 841(b)(1)(B), to a probationary term of three years.

Dated: New York, New York
December 2nd, 1974

Yours, etc.

LA ROSSA, SHARGEL & FISCHETTI
Attorneys for Defendant
ROBERT WILNER
Office and P.O. Address
522 Fifth Avenue
New York, New York 10036
687-4100

By: _____
A Member of the Firm

TO:

HON. PAUL J. CURRAN
United States Attorney
Southern District of New York
United States Courthouse
Foley Square
New York, New York

The defendant's home address is:

53 Hawley Avenue
Port Chester, New York

Service of ~~three (3)~~ two (2) copies of the within
Appendix is hereby admitted
this day of

.....

Attorney(s) for

COPY RECEIVED
1975
U.S. ATTORNEY
SO. DIST. OF N.Y.